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Regional Rail Reorganization Act of 1973: Was Congress on the Right Track?

Alisa Levin Bleich

NOTES AND COMMENTS

REGIONAL RAIL REORGANIZATION ACT OF 1973: WAS CONGRESS ON THE RIGHT TRACK?

Once I built a railroad, made it run,—
Made it race against time.
Once I built a railroad, Now it's done—
*Brother can you spare a dime?**

Between April 1967 and October 1973, nine northeastern railroads found themselves unable "to meet [their] debts as they mature[d]"[1] and petitioned the courts for reorganization under section 77 of the Bankruptcy Act.[2] Most noticeable and perhaps shocking was the petition filed on June 21, 1970 by the nation's largest transportation company, the Penn Central.[3] In less than thirty months this once promising enterprise, produced by the merger of the Pennsylvania and New York Central Railroads,[4] became one of the largest United States companies ever to commence bankruptcy proceedings.

By early 1973, it had become evident that existing statutory procedures were not only incapable of producing a successfully reorganized

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1 Bankruptcy Act § 77, 11 U.S.C. § 205 (1970).

2 *Id.* These nine railroads are still in reorganization under § 77 of the Bankruptcy Act, which enables insolvent railroads to continue operations while a plan for reorganization resolving creditor claims is formulated. *See* text accompanying notes 23-28 *infra.*

Railroad	Date Petition for Reorganization Filed	Reorganization Court
Central of New Jersey	Apr. 1967	D.N.J. (Newark)
Boston & Maine	Mar. 1970	D. Mass. (Boston)
Penn Central	June 1970	E.D. Pa. (Philadelphia)
Lehigh Valley	July 1970	E.D. Pa. (Philadelphia)
Cadillac & Lake City	Sept. 1971	W.D. Mich. (Grand Rapids)
Reading	Nov. 1971	E.D. Pa. (Philadelphia)
Lehigh & Hudson River	Apr. 1972	S.D.N.Y. (New York City)
Erie Lackawanna	June 1972	N.D. Ohio (Cleveland)
Ann Arbor	Oct. 1973	E.D. Mich. (Detroit)

3 *See* H.R. Rep. No. 620, 93d Cong., 1st Sess. 26 (1973) [hereinafter cited as H.R. Rep.]; N.Y. Times, June 22, 1970, at 1, col. 7. At the time of its collapse, the Penn Central had 20,000 miles of track extending across 16 states, the District of Columbia and two Canadian provinces. H.R. Rep. at 26.

4 The merger of the two railroads became effective on February 1, 1968. *See* Moody's Investors Service, Inc., Moody's Transportation Manual 266 (1973) [hereinafter cited as Moody's Transp. Manual].

rail system, but were inadequate to deal with the rapidly deteriorating northeastern rail situation. Meanwhile, the nation was threatened with cessation of rail services crucial to its economy. In response to this exigent situation, Congress enacted the Regional Rail Reorganization Act of 1973[5] (RRRA) with the express purpose of consolidating and revitalizing the then bankrupt northeastern railroads "into an economically viable system capable of providing adequate and efficient rail services . . . ."[6] The hope of Congress that the RRRA would provide a mechanism to solve the pressing rail problems may prove, however, to have been unduly optimistic. The Act has already been subjected to repeated attacks by a plethora of creditors,[7] and several courts have held certain of its provisions to be violative of the Constitution.[8]

This note will discuss the circumstances which necessitated enactment of the RRRA, the significant provisions contained therein, and in particular, the constitutional confrontations it has engendered. Since no other acceptable solution to the rail crisis appears imminent, speedy judicial resolution of the constitutional questions raised is essential and immediate congressional attention to any constitutional infirmities is mandated.

HISTORICAL BACKGROUND

The Northeast Rail Crisis

The financial collapse of the blue-chip Penn Central Transportation Company understandably took a large part of the nation by surprise.[9] The difficulty that it, as well as other bankrupt northeast railroad carriers, encountered, however, was not the result of surprising or sud-

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[5] Pub. L. No. 93-236, § 101 *et seq.* (Jan. 2, 1974) [hereinafter cited as RRRA or the Act], 45 U.S.C. § 701 *et seq.* (Supp. III, 1974).

[6] RRRA § 101(b)(2), 45 U.S.C. § 701(b)(2) (Supp. III, 1974).

[7] *See* text accompanying notes 74-92 *infra*. As of December 31, 1971, a gross amount of $3,348,620,840 had been claimed against the Penn Central. A partial breakdown shows that:

> [f]ifty-one secured creditors filed timely proofs of claim in the amount of $1,062,734,988. Ten indenture trustees filed claims in the amount of $963,135,138. Thirty-five individual bondholders claimed $81,911,646. Six claimants filed claims arising from conditional purchases of equipment and property in the amount of $17,688,204. An accountants' report indicates that on June 21, 1970, the long-term debt in respect of mortgage bonds and collateral trust bonds, exclusive of railroad equipment obligations, was $687,692,000. This, of course, is only a partial listing of the claims.

Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, Civil No. 74-189, at 32-33 (E.D. Pa., June 25, 1974) (footnotes omitted), *prob. juris. noted*, 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165), *citing* Trustees' Plan for Reorganization, April 1, 1972, Attachment 5, at 6-7 (Doc. No. 3033).

[8] *See* text accompanying notes 74-92 *infra*.

[9] *See* N.Y. Times, June 23, 1970, at 59, col. 8; Wall Street Journal, June 23, 1970, at 3, col. 1.

den changes in events. To the contrary, their individual financial conditions had been slowly deteriorating as it became increasingly more difficult to operate an outdated and unwieldy railroad system in an ever-changing industrial economy.[10]

Numerous factors have caused the railroads to lose the preeminent position they once occupied in transportation. The industries which traditionally relied upon railroads have declined in importance, while both the geographic location and service needs of major industrial rail users have changed.[11] Furthermore, intermodal competition complicates the situation.[12] For example, in the Northeast, where major cities are situated in relative proximity to one another and trucks utilize modern highway systems to transport freight over many comparatively short-haul routes,[13] it would be economically advantageous if railroads could concentrate on providing long-haul service. Rail service in this region, however, is primarily designed for short-hauls,[14] and given the present circumstances, neither the time nor the capital for a major redesign is available.

In addition to changing patterns of commercial transportation, government regulatory policies and inept management have accelerated the demise of the northeastern railroads. Under Interstate Commerce Commission (ICC) regulatory procedures, rate flexibility is difficult to achieve and excess trackage hard to abandon.[15] Moreover, while govern-

10 Particularly helpful in understanding the northeast rail crisis is the extensive report prepared in 1972 analyzing the financial collapse of the Penn Central. STAFF OF SENATE COMM. ON COMMERCE, 92d Cong., 2d Sess., THE PENN CENTRAL AND OTHER RAILROADS — A REPORT TO THE SENATE COMMITTEE ON COMMERCE (Comm. Print 1972) [hereinafter cited as PENN CENT. REP.]. The problems contributing to the plight of the northeastern railroads have also been considered by many commentators. *See* Barber, *Railroad Reorganization, Section 77, and the Need for Legislative Reform*, 21 U.C.L.A.L. REV. 553 (1973) [hereinafter cited as Barber]; Brewer, *The Eastern Railroad Situation: Danger of Nationalization (The Opening Wedge?)*, 40 ICC PRAC. J. 581 (1973) [hereinafter cited as Brewer]. In addition, both the House and Senate reports on the RRRA discuss the many factors involved in the crisis. *See* H.R. REP., *supra* note 3, at 25-29; S. REP. No. 601, 93d Cong., 1st Sess. 6-14 (1973) [hereinafter cited as S. REP.].

11 Bulk products historically composed a large part of railroad traffic. With the diminishing importance of forestry, mining, and agriculture, for example, the railroads have been significantly hurt. Loss in traffic is also attributable in part to a change in industrial activity. Manufacturing in the Northeast has declined and certain industries have dispersed to other parts of the country. *See* PENN CENT. REP., *supra* note 10, at 21-30, 221; H.R. REP., *supra* note 3, at 27; Barber, *supra* note 10, at 558; Brewer, *supra* note 10, at 586.

12 *See* Barber, *supra* note 10, at 559-61; Brewer, *supra* note 10, at 587-88. In 1929, railroads accounted for 74.9% of intercity freight transportation. While their share diminished to 40.8% by 1970, the share hauled by trucks rose from 3.3% to 21%. Washington Post, Jan. 30, 1972, at C1, col. 2. Moreover, from 1970 to 1971, the total number of intercity ton miles transported by rail declined 3.3% while motor vehicles managed to increase their share by 4.4%. 86 ICC ANN. REP. 132 (1972).

13 *See* Brewer, *supra* note 10, at 587.

14 H.R. REP., *supra* note 3, at 27.

15 *See id.* The staff of the Senate Committee on Commerce, while noting the role

ment spending has been used to develop the nation's highways and improve its waterways, railroads have not been correspondingly subsidized.[16] Finally, in the case of the Penn Central, questionable management practices have contributed to the carrier's decline.[17] In light of all these factors, it is not surprising the railroads were forced to seek judicial protection from creditors' claims.

To describe the northeastern rail system as anachronistic, however, is not to minimize the crucial role it plays in the economy. For example, during 1970, the Penn Central transported one million tons of freight, thereby becoming the leading carrier of "automobiles, chemicals, metals, coal and manufactured consumer products."[18] Additionally, the railroad was responsible for the daily movement of 300,000 passengers.[19] Authorities estimate that within eight weeks of a Penn Central shutdown, the national rate of economic activity would decrease by 4 percent and the gross national product by 2.7 percent.[20] Furthermore, since the Penn Central is linked to other rail systems, its own shutdown would inevitably bring hardship upon even prosperous railroads of the Northeast and other regions.[21] Accordingly, the ultimate legislative determination that the continuation of rail operations is vital to the protection of the public interest[22] appears well justified.

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regulation plays in contributing to the rigidity of rate structures, cautioned that the industry's own "marketing perspective" is in part to blame. PENN CENT. REP., *supra* note 10, at 280-83. ICC Vice-Chairman Brewer, in response to popular criticism of the ICC, has defended its rate policies as allowing flexibility within reason. He reports that 99% of the requests for rate adjustments filed annually are approved. In addition, he notes the ICC's simplified abandonment procedures. Brewer, *supra* note 10, at 589-90. *See also* 87 ICC ANN. REP. 5-6 (1973).

16 *See* PENN CENT. REP., *supra* note 10, at 221; Brewer, *supra* note 10, at 588.

17 The House Committee bluntly stated that "bad management bordering on gross misconduct, is one of the important reasons for the Penn Central collapse . . . ." H.R. REP., *supra* note 3, at 26. *See* J. DAUGHEN & P. BINZEN, THE WRECK OF THE PENN CENTRAL (1971). *But see* PENN CENT. REP., *supra* note 10, at xx (concluding misconduct was *not* an important cause of the collapse).

18 H.R. REP., *supra* note 3, at 26.

19 *Id.*

20 *Id.*; PENN CENT. REP., *supra* note 10, at xix. For other estimates and illustrations of the drastic effects a shutdown would impose on the national economy, see S. REP., *supra* note 10, at 8.

21 For example, as of 1970, 70% of Penn Central traffic was connected with other railroads. H.R. REP., *supra* note 3, at 26; *see* Barber, *supra* note 10, at 566-67. Despite the promising outlook reported for southern and western railroads, the ICC has warned: "More than any other form of transportation, the railroad network exists as a national system, with no single segment able to remain unaffected by local or regional deterioration." 86 ICC ANN. REP. 7-8 (1972).

22 *See* H.R. REP., *supra* note 3, at 28. In rather strong language, the House Committee declared that

> the public interest would not be served if these bankrupt carriers were shut down and sold on the "auction block." . . . The future of rail transportation in the Northeast transcends the interests of not only the investors, the creditors, the

Inadequacy of Present Legislation

Theoretically, existing legislation should have afforded sufficient relief for the heavily debt-burdened railroads. Upon commencement of reorganization under section 77 of the Bankruptcy Act,[23] one or more trustees are appointed by the court to operate the railroad.[24] Thereafter, the debtor, trustees, and creditors prepare plans of reorganization[25] which, by adjusting creditors' claims, are designed to ease the fixed charge and debt service burdens[26] the railroad has theretofore been carrying.[27] Through continued operations during the reorganization period, protection of the public interest in the rendition of rail services and preservation of the remaining going concern value of the existing systems are intended.[28] Ultimately, the debtor railroad is to become an economically stable entity.

Those familiar with section 77, however, questioned its ability to provide a mechanism for achieving the desired result in the case of the northeast rail crisis.[29] Enacted as an emergency measure in 1933 during the Great Depression, section 77 was primarily designed to cope with railroad failures resulting from generally adverse economic conditions.[30]

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managers and trustees, and the people and the industries of the Northeast region — it is an American problem, one affecting all of us.

Id.

23 11 U.S.C. § 205 (1970), *discussed in* Haskell, *Railroad Reorganization for Beginners*, 24 ALA. L. REV. 295 (1972).

24 Bankruptcy Act §§ 77(c)(1), (2), 11 U.S.C. §§ 205(c)(1), (2) (1970).

25 *Id.* § 77(d), 11 U.S.C. § 205(d).

26 In railroad accounting, fixed charges include rent for leased roads (usually guaranteed interest or dividends); rent for leased properties; interest on funded debt; interest on short-term or unfunded debt; and amortization of discount on funded debt.

G. MUNN, ENCYCLOPEDIA OF BANKING AND FINANCE 278 (6th ed. 1962).

Debt services have been defined as: "Payment of the interest on a debt and of such installments of the principal as are legally due." H. SLOAN & A. ZURCHER, DICTIONARY OF ECONOMICS 117 (5th ed. 1970).

27 *See* 5 COLLIER, BANKRUPTCY ¶ 77.02, at 469-70 (14th ed. 1974). The Bankruptcy Act § 77(b), 11 U.S.C. § 205(b) (1970), sets forth the contents of a reorganization plan. For a brief summary of the powers that § 77 grants the reorganization court, see Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, Civil No. 74-189, at 12-13 (E.D. Pa., June 25, 1974) (Fullam, J., concurring).

28 *See* New Haven Inclusion Cases, 399 U.S. 392, 431 (1970); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 676 (1935), *cited in* Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, Civil No. 74-189, at 13 (E.D. Pa., June 25, 1974) (Fullam, J., concurring).

29 *See, e.g.*, Barber, *supra* note 10; Lasdon, *The Evolution of Railroad Reorganization*, 39 ICC PRAC. J. 540 (1972) [hereinafter cited as Lasdon]. *See also* Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, Civil No. 74-189, at 13-15 (E.D. Pa., June 25, 1974) (Fullam, J., concurring).

30 The history of railroad reorganization antedates § 77. In the mid-19th century, corporate mortgages were becoming a popular method of financing railroads. Regrettably, these mortgages were strictly enforced and the railroads suffered serious losses of income and disruption of services. To remedy this situation, the equity receivership was devel-

The fact that the northeast rail problem developed during a period of economic boom[31] should alone have indicated that problems of greater complexity were to be encountered.

Many experts believed that major consolidation of the various rail systems and abandonment of certain duplicative or underutilized lines were prerequisites for the survival, on an economically sound basis, of railroads in the Northeast.[32] However, under section 77, each debtor must seek approval of its own plan of reorganization. Certainly, with seven Class I railroads, *i.e.*, railroads with annual revenues exceeding $5 million, and two Class II[33] railroads undergoing reorganization in separate proceedings in district courts in Detroit, Grand Rapids, Cleveland, Boston, New York, Newark, and Philadelphia,[34] no one plan could be expected to accomplish consolidation and rationalization of rail service. It is clear that only through a unified and coordinated plan — virtually impossible as a practical matter under section 77[35] — could efficient operations commensurate with industrial needs be achieved.

oped. A court-appointed receiver would continue operations while a plan for rehabilitation or liquidation was formulated by the creditors and stockholders. *See* Fuller, *The Background and Techniques of Equity and Bankruptcy Railroad Reorganizations — A Survey*, 7 LAW & CONTEMP. PROB. 377 (1940); Lasdon, *supra* note 29, at 541-42.

By 1933, the equity receivership process had proved unsatisfactory. It was considered too lengthy and costly a process which afforded the court and the ICC little control. *See* Lasdon, *supra* note 29, at 543-44. Section 77 was, in part, enacted to remedy the deficiencies of equity receivership. *See* Weiner, *Reorganization Under Section 77: A Comment*, 33 COLUM. L. REV. 834 (1933). It also represented, to a great extent, the legislative response to the particular problems of that day. The depression had taken its toll on the railroads, and an emergency measure was necessary. *See* Lasdon, *supra* note 29, at 544. Unconcerned with structural or operational changes, § 77 provided a framework for reducing fixed charges and correcting overcapitalization. H.R. REP., *supra* note 3, at 29. *See* 5 COLLIER, BANKRUPTCY ¶ 77.02, at 469-70 (14th ed. 1974); Barber, *supra* note 10, at 567-68. It is this characteristic of § 77 which makes its usefulness for today's problems questionable. *In re* Penn Cent. Transp. Co., No. 74-8, at 8 (Spec. Ct. RRRA, Sept. 30, 1974).

31 *See* PENN CENT. REP., *supra* note 10, at 453, *citing* COUNCIL OF ECONOMIC ADVISERS, ECONOMIC REPORT TO THE PRESIDENT 196 (1972).

32 *See, e.g.*, Brewer, *supra* note 10, at 592-93; Kneafsey & Edelman, *A Market-Oriented Solution to the Northeast Railroad Dilemma*, 41 ICC PRAC. J. 174, 178 (1974).

33 The ICC categorizes railroads having annual revenues of $5 million or more as Class I railroads and those having less than $5 million in annual revenues as Class II railroads. MOODY'S TRANSP. MANUAL, *supra* note 4, at a5. The seven Class I northeastern railroads now undergoing reorganization pursuant to § 77 are the Ann Arbor, the Boston & Maine, the Central of New Jersey, the Erie Lackawanna, the Lehigh Valley, the Penn Central, and the Reading. The two Class II railroads are the Cadillac & Lake City and the Lehigh & Hudson River. *See* note 2 *supra*.

34 *See* note 2 *supra*.

35 The Commission on the Bankruptcy Laws of the United States addressed this problem in its 1973 study of all existing bankruptcy laws. A primary recommendation for change in § 77 is a procedural device enabling, when necessary, independent reorganization proceedings to be transferred to a single judge for continued administration. This proposal is designed to facilitate common supervision and thus minimize inconsistent orders and duplication of effort. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st. Sess. pt. 1, at 271 (1973).

Another serious deficiency of section 77 lies in its inherent slowness. Although ultimate responsibility for supervising the reorganization process rests in the district court,[36] the ICC, an active participant throughout,[37] must approve any reorganization plan prior to judicial confirmation.[38] With the debtor railroad being shuttled back and forth between the district court and the ICC until agreement upon an acceptable plan is reached,[39] section 77 proceedings often drag on for many years.[40] During continued operations, an already enfeebled financial structure can suffer serious deterioration of assets.[41] Thus, while continued operation is desirable in the public interest, creditors may be adversely affected.

It was this predicament which presented itself in the northeast rail crisis. Given the revenues lost daily as bankruptcy proceedings under section 77 labored on and the understandable inability of the various trustees to formulate acceptable reorganization plans,[42] creditors and the courts began to question the wisdom of continued operations.[43] The

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36 *See* Bankruptcy Act § 77, 11 U.S.C. § 205 (1970).

37 For example, the ICC must ratify the court's appointment of trustees, *id.* § 77(c)(1), 11 U.S.C. § 205(c)(1); hold public hearings on proposed plans of reorganization, *id.* § 77(d), 11 U.S.C. § 205(d), and, when necessary, determine the value of rail properties. *Id.* § 77(e), 11 U.S.C. § 205(e). The role of the ICC is discussed in Craven, *The Judicial and Administrative Mechanism of Section 77*, 7 LAW & CONTEMP. PROB. 464 (1940).

38 Bankruptcy Act § 77(d), 11 U.S.C. § 205(d) (1970).

39 *See In re* Penn Cent. Transp. Co., No. 74-8, at 58 (Spec. Ct. RRRA, Sept. 30, 1974); Sunderland, *Suggestions for Improvement in Section 77 of the Bankruptcy Act*, 14 BUS. LAW. 487, 498 (1959). Notably, in its proposed revision of § 77, the Commission on the Bankruptcy Laws of the United States has significantly altered the role of the ICC to reduce unnecessary delays built into the present reorganization process. REPORT OF THE COMMISSION ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. pt. 1, at 266-67 (1973).

40 The Central of New Jersey has been in reorganization for over seven years. *See* note 2 *supra*. This is unfortunate, yet not unexpected in light of past experience with § 77. For example, the Missouri Pacific Railroad was in reorganization for 15 years, *see* Comstock v. Group of Institutional Investors, 335 U.S. 211 (1948), and the Chicago Milwaukee, St. Paul & Pacific Railroad for 8 years, *see* Group of Institutional Investors v. Chicago, Mil., St. P. & Pac. R.R., 318 U.S. 523 (1943).

41 The court presiding over the reorganization of the Penn Central found:

> During the period from the filing of the Debtor's reorganization petition on June 21, 1970, to December 31, 1973, the Debtor's operations have produced losses in ordinary income, calculated in accordance with ICC regulations (49 CFR Part 1201, 501-51) totalling $851.1 million.

In re Penn Cent. Transp. Co., Bky. No. 70-347, at 6 (E.D. Pa., May 2, 1974) (120-day decision). Even though the $851.1 million figure does not represent actual *cash* lost, it illustrates the magnitude of the problem.

42 In the case of the Penn Central, three reorganization plans were offered by the trustees and various creditors. None of them passed muster with the ICC. ICC, PENN CENT. TRANSP. CO. REORGANIZATION, FINANCE DOCKET NO. 26241 (Sept. 28, 1973).

43 On March 6, 1973, Judge Fullam, presiding over the reorganization of the Penn Central, cautioned:

> On the basis of the record to date, it appears highly doubtful that the Debtor could properly be permitted to continue to operate on its present basis beyond October 1, 1973.

consequences the nation would suffer as a result of a shutdown, however, made liquidation an inadvisable and drastic measure. At minimum, a creative solution was necessitated.

THE RRRA: ENACTMENT AND JUDICIAL AFTERMATH

Congressional Deliberation

Congress, having become aware that section 77 did not provide a satisfactory framework for solution of the northeast rail crisis, began to study the available alternatives.[44] As reported by the House Committee on Interstate and Foreign Commerce, various policy decisions were considered in formulating a solution.[45] Liquidation was rejected out of hand because of the "devastating" effect interruption of services would have on the economy.[46] Nationalization of the railroads was avoided because the Committee, fearful of setting a precedent, felt that public policy was best served by private enterprise.[47] Mere subsidization was deemed inappropriate to achieve the coordination of separate and isolated reorganization proceedings believed necessary to produce a viable economic entity.[48] The solution ultimately adopted, in the words of the Committee, was "a railroad reorganization plan which would consolidate parts of six bankrupt [*sic*] carriers into a new for-profit carrier."[49] Consequently, the RRRA, in essence a plan for reorgani-

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In re Penn Cent. Transp. Co., 355 F. Supp. 1343, 1346 (E.D. Pa. 1973). Taking judicial notice of the prospective congressional action, the court granted the trustees a three-month extension for filing a reorganization plan. *Id.* This plan was filed on July 5, 1973, but did not receive ICC approval. *See* ICC, PENN CENT. TRANSP. CO. REORGANIZATION, FINANCE DOCKET NO. 26241 (Sept. 28, 1973).

44 For example, in February 1973, Congress directed the Secretary of Transportation to submit a "full and comprehensive plan for the preservation of essential rail transportation services in the Northeast . . . ." S.J. Res. of Feb. 9, 1973, § 2, 87 Stat. 5.

45 H.R. REP., *supra* note 3, at 28-29.

46 *Id.* at 28.

47 *Id.* Notwithstanding congressional pronouncements to the contrary, a number of commentators contend that, in reality, the RRRA is working a nationalization of the railroads. *See, e.g.*, Albright, *A Hell of a Way to Run a Government*, N.Y. Times, Nov. 3, 1974, § 6 (Magazine), at 16.

48 *See* H.R. REP., *supra* note 3, at 27-28. It should be noted that the RRRA is not Congress' first bout with the northeast rail crisis. In 1970, Congress agreed to guarantee up to $125 million in certificates to be issued by trustees of railroads in reorganization. Emergency Rail Services Act of 1970, 45 U.S.C. § 661 *et seq.* (1970). Although this congressional action did enable the trustees to borrow money on their certificates and thus remedy the immediate cash shortage, it did not otherwise address itself to the long-range problems facing the railroads. *See In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 3 (E.D. Pa., July 2, 1974) (180-day decision), *rev'd, In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974).

49 H.R. REP., *supra* note 3, at 23-24. The report refers to only six railroads since at the time it was written the Ann Arbor had not yet filed its petition, and the Lehigh & Hudson River and the Cadillac & Lake City, Class II railroads, were apparently deemed of lesser significance.

zation addressed exclusively to the debtor northeastern railroads,[50] was signed into law on January 2, 1974.[51] The Act was designed to provide resources unavailable under section 77 and, as was hoped by its sponsors, a solution to the already unduly prolonged reorganization process.

Significantly, the House Committee, which included the chief architects of the Act,[52] expressly stated that it was not providing a " 'Creditors Relief bill.' "[53] It believed that all investors, by nature, must take risks and be prepared to suffer all eventual consequences. This was especially true in the case of railroads, the Committee reasoned, because of investor awareness of the "traditional and historic 'public interest' character of the industry."[54] In no uncertain terms, the Committee members expressed their belief that creditors' rights in rail investments were subservient to this public interest. As ultimately reflected in the RRRA, such subservience may run afoul of constitutional limitations. In outlining the key provisions of the Act, special attention will be paid to those features which have given rise to, or have become involved in, constitutional challenges.

Provisions of the RRRA

The RRRA establishes three new organizations to effect its purposes. The United States Railway Association (USRA), a government

Notably, merger as the solution to rail system overcapacity is not a new idea. The Transportation Act of 1920, ch. 91, § 407, 41 Stat. 480, required the ICC to formulate a national consolidation plan. The ICC did approve such a plan in 1929. Unlike the mergers envisioned by RRRA, the Commission's contemplated mergers were to be voluntary on the part of the railroads. Proposed mergers, however, had to fit into the ICC's 21 designated rail systems. *See* Consolidation of Railroads, 159 I.C.C. 522 (1929). Unsuccessful, the Act was repealed by Congress in 1940. Transportation Act of 1940, ch. 722, § 7, 54 Stat. 905. *See* Beverly, *Railroad Mergers: The Forces of Intermodal Competition*, 50 A.B.A.J. 641 (1964) for a discussion of the promulgation and failure of this early effort towards consolidation.

Some commentators have questioned the desirability of mergers. *See, e.g.*, Boyle & Hille, *Railroad Mergers—An Alternative?*, 34 ICC PRAC. J. 405 (1967); Comment, *Railroad Mergers*, 18 SW. L.J. 439 (1964). Such questioning is, in part, grounded on the philosophy that the incentives a competitive system fosters are lost when rail systems are merged. Since the Northeast is apparently unable to support competing rail systems, and since intermodal competition in this area is substantial, this reason for opposing mergers appears to be inapposite. For a more current discussion, generally advocating merger and consolidation of the nation's railroads in order to meet intermodal competition as well as competition for the investment dollar, see Ploss, *The Railroad Merger Picture: A Reply to Critics*, 4 CUMBERLAND-SAMFORD L. REV. 458 (1974).

[50] The Act applies only to those railroads in a specified region consisting of 17 states in the Northeast and Midwest and the District of Columbia. RRRA § 102(13), 45 U.S.C. § 702(13) (Supp. III, 1974). This limited application of the Act has given rise to a constitutional challenge involving the uniformity requirement of the bankruptcy clause. *See* note 205 *infra*.

[51] *See* note 5 *supra*.

[52] The authors of H.R. 9142 which, in large part, became the RRRA were Representatives Dick Shoup of Montana and Brock Adams of Washington.

[53] H.R. REP., *supra* note 3, at 28.

[54] *Id.*

corporation, is primarily charged with formulating the final system plan and issuing obligations for its financing.[55] The final system plan will designate those rail properties to be conveyed pursuant to the Act and will specify the consideration to be paid therefor.[56] Consolidated Rail Corporation (Conrail), a for-profit corporation, will acquire and operate the designated rail properties.[57] A Rail Services Planning Office, created as part of the ICC, is designed to be, *inter alia*, the vehicle through which interested parties may make their views available to the system planners.[58] Moreover, the Act contains a specific time schedule for performance of required steps in the reorganization, culminating, as originally enacted, with conveyance in the fall of 1975.[59] It appears that by providing a coordination mechanism and specifying a timetable, Congress creatively ameliorated, if not eliminated, two major deficiencies of ordinary section 77 proceedings.

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[55] RRRA §§ 201-02, 45 U.S.C. §§ 711-12 (Supp. III, 1974).
[56] *Id.* § 206, 45 U.S.C. § 716.
[57] *Id.* §§ 301-04, 45 U.S.C. §§ 741-44.
[58] *Id.* § 205, 45 U.S.C. § 715.
[59] SCHEDULE FOR IMPLEMENTATION OF THE FINAL SYSTEM PLAN

Date	Provision	RRRA §	45 U.S.C. § (Supp. III, 1974)
May 2, 1974 [120-day decision]	Reorganization courts' determination of whether debtor railroads can be reorganized on an income basis under § 77	207(b)	717(b)
July 1, 1974 [180-day decision]	Reorganization courts' determination of whether debtor railroads will be reorganized pursuant to RRRA	207(b)	717(b)
Sept. 30, 1974	Special Court's disposition of appeals from 180-day decisions	207(b)	717(b)
Mar. 1975*	USRA delivers final system plan to Congress which is deemed approved 60 days thereafter (May 1975) unless action to the contrary is taken	208(a)	718(a)
Aug. 1975*	USRA delivers final system plan to Special Court and to reorganization courts	209(c), (d)	719(c), (d)
Sept. 1975*	Conrail deposits with the Special Court consideration for rail assets to be conveyed	303(a)	743(a)
Sept. 1975*	Special Court orders conveyance of rail assets to Conrail	303(b)	743(b)
Thereafter	Special Court reviews terms of conveyances and orders distribution of compensation	303(c)	743(c)

* These dates are calculated on the assumption that each stage will take approximately, but no more than, the maximum length of time allocated in the Act.

On October 26, 1974, President Ford signed Pub. L. No. 93-488, which extends by four months the deadline for drafting the final system plan. Successive stages will be delayed accordingly.

To determine which of the debtors are actually to participate in the creation of Conrail, the Act established a two-stage judicial process to be implemented by district courts presiding over railroads in reorganization. One hundred and twenty days after enactment of the RRRA, in the so-called "120-day decisions," these courts were to decide whether the debtor railroads were reorganizable under section 77 on an income basis[60] within a reasonable time and whether such reorganization would be in the public interest.[61] In the second judicial stage — the "180-day decisions" — the same courts were to order the respective debtors to reorganize under the RRRA, which would ultimately result in the transferring of properties to Conrail.[62] The order to proceed under the

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[60] The RRRA does not contain a definition of the term "income basis." Judge Fullam, in his 120-day decision in *Penn Central*, found the test for continuation of reorganization under § 77 to be whether there was enough net income to support a "realistic re-capitalization." *In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 5 (E.D. Pa., May 2, 1974). Elsewhere, Judge Fullam distinguished an income-based reorganization under § 77 from the type of reorganization approved in the New Haven Inclusion Cases, 399 U.S. 392 (1970). There, the debtor's "rail assets were disposed of, with a view toward reorganizing the enterprise as an investment holding company." Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, Civil No. 74-189, at 9 (E.D. Pa., June 25, 1974) (Fullam, J., concurring). In an income-based reorganization, the debtor will continue to operate its rail assets and only its debt structure will be revamped. *See In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 5 (E.D. Pa., May 2, 1974) (120-day decision).

[61] Section 207(b), 45 U.S.C. § 717(b) (Supp. III, 1974) provides in pertinent part:

> Within 120 days after the date of enactment of this Act each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by continuing the present reorganization proceedings than by a reorganization under this Act. . . . [Within 180 days after the date of enactment of this Act] each United States district court or other court having jurisdiction over a railroad in reorganization shall decide whether or not such railroad shall be reorganized by means of transferring some of its rail properties to [Conrail] pursuant to the provisions of this Act. Because of the strong public interest in the continuance of rail transportation in the region pursuant to a system plan devised under the provisions of this Act, each such court shall order that the reorganization be proceeded with pursuant to this Act unless it (1) has found that the railroad is reorganizable on an income basis within a reasonable time under section 77 of the Bankruptcy Act (11 U.S.C. 205) and that the public interest would be better served by such a reorganization than by a reorganization under this Act, or (2) finds that this Act does not provide a process which would be fair and equitable to the estate of the railroad in reorganization in which case it shall dismiss the reorganization proceedings . . . . An appeal from an order made under this section may be made only to the special court . . . .

Pursuant to the "120-day decisions," the Erie Lackawanna, the Boston & Maine, and the Cadillac & Lake City railroads were found reorganizable on an income basis under § 77. These courts further found that such reorganization would be in the public interest. *See In re* Penn Cent. Transp. Co., No. 74-8, at 6 & n.8, 7 n.9 (Spec. Ct. RRRA, Sept. 30, 1974). The Penn Central, Lehigh Valley, Central of New Jersey, Lehigh & Hudson River, the Reading, and the Ann Arbor railroads were found not reorganizable on an income basis under § 77 within a reasonable time. *In re* Reading, 378 F. Supp. 474 (E.D. Pa. 1974); *In re* Ann Arbor R.R., No. 74-90833 (E.D. Mich., May 1, 1974); *see In re* Penn Cent. Transp. Co., No. 74-8, at 6 n.8 (Spec. Ct. RRRA, Sept. 30, 1974).

[62] RRRA § 207(b), 45 U.S.C. § 717(b) (Supp. III, 1974).

RRRA was mandatory unless either a 120-day decision that the railroad was reorganizable under section 77 had been made, or the reorganization court found the Act did not provide a process which would be fair and equitable to the debtor's estate.[63] Appeals from the decisions of these reorganization courts were to be heard by a special three-judge district court (the Special Court) established by the Act to decide various issues arising thereunder.[64]

Pursuant to the Act, pending implementation of the final system plan, no rail operations may be discontinued or abandoned without the USRA's consent.[65] In an attempt to insure that such operations could in fact be continued during the planning period, Congress provided a maximum of $85 million in emergency assistance, payable at the discretion of the Secretary of Transportation to trustees of the debtor railroads.[66] An additional benefit of this assistance, although perhaps unintended, may be its usefulness as a response to creditors' claims that the assets of the debtors' estates are being unconstitutionally eroded during the mandated continued operations.[67]

The Act further stipulates that once the final system plan has withstood the possibility of congressional veto, conveyance to Conrail "free and clear of any liens" is mandated.[68] The consideration to be

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[63] *Id.*, *quoted in* note 61 *supra*. The Erie Lackawanna, Boston & Maine, and Cadillac & Lake City railroads continued reorganization under § 77 because a positive finding in the 120-day decision was made. *See* note 61 *supra*. The district courts presiding over the reorganization of the Ann Arbor and the Reading, however, ordered them to reorganize by transferring some of their properties to Conrail. *In re* Reading, 378 F. Supp. 481 (E.D. Pa.), *aff'd sub nom. In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974); *In re* Ann Arbor R.R., No. 74-90833 (E.D. Mich., July 1, 1974), *aff'd sub nom. In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974). As to the four remaining railroads, the reorganization courts found the Act did not provide a process which would be fair and equitable to the debtors' estates. *In re* Penn Cent. Transp. Co., Bky. No. 70-347 (E.D. Pa., July 2, 1974), *rev'd*, *In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974); *In re* Lehigh Valley R.R., Bky. No. 70-432 (E.D. Pa., July 2, 1974); *In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974); *In re* Central R.R., No. B.401-67 (D.N.J., June 28, 1974), *rev'd sub nom. In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974); *In re* Lehigh & H.R. Ry., No. 72 B 419 (S.D.N.Y., July 1, 1974), *rev'd sub nom. In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974).

[64] RRRA § 209(b), 45 U.S.C. § 719(b) (Supp. III, 1974). The Judicial Panel on Multidistrict Litigation selected Circuit Judges Henry J. Friendly and Carl McGowan and District Judge Roszel C. Thomsen to compose the Special Court. The District of Columbia was designated the district for the litigation. Judge Friendly is the presiding judge. *In re* Litigation Under the RRRA, 373 F. Supp. 1401, 1403 (Jud. Panel on Multidistr. Lit. 1974) (per curiam). The decision of the Special Court is discussed in the text accompanying notes 90-92 *infra*.

[65] RRRA § 304(f), 45 U.S.C. § 744(f) (Supp. III, 1974).

[66] *Id.* § 213, 45 U.S.C. § 723.

[67] *See* text accompanying notes 94-134 *infra*.

[68] RRRA § 303(b)(2), 45 U.S.C. § 743(b)(2) (Supp. III, 1974).

paid for the designated properties is to consist of "stock and other securities of [Conrail] (including obligations of [USRA]) and the other benefits accruing to such railroad by reason of such transfer."[69] Since no more than $500 million in USRA obligations, guaranteed by the federal government, is available to Conrail for acquisition of such rail properties, it is clear that the debtor railroads, and in turn their creditors, will ultimately be required to look to Conrail securities, especially its common stock, for their recovery.[70]

It is noteworthy that judicial review of the terms of the transfer is precluded until after conveyance.[71] Should the Special Court find that the payment was not "fair and equitable," it may (1) reallocate Conrail securities among the various debtors; (2) order Conrail to transfer additional designated securities and obligations; or (3) enter a deficiency judgment against Conrail.[72] It may not, under the terms of the Act, set the conveyance aside.

The aforementioned provisions of the RRRA have generated significant opposition from interested creditors. Primarily, the permissibility of compulsory interim operations and the constitutionality of the mandatory conveyance features have been critical issues in the litigation spawned by the Act.[73] As will be discussed, these attacks have been made both in separate litigation beyond the confines of the Act and in the proceedings provided in the RRRA itself.

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[69] *Id.* § 206(d)(1), 45 U.S.C. § 716(d)(1). Mention of "other benefits accruing" to the debtor as a result of the transfer is made both in the quoted section on the terms of conveyance and as one of the factors to be considered by the Special Court in evaluating the transfer. *Id.* § 303(c), 45 U.S.C. § 743(c). The intended benefits could include any gain the debtor receives by virtue of reorganizing under the Act. If, for example, the debtor takes advantage of the relevant provisions in the Act allowing discontinuance of operations not designated to be part of Conrail, the value of this right to the debtor would be considered part of the compensation paid by Conrail for conveyance of the debtor's rail properties. Accordingly, the amount of stock and other obligations paid to the debtor would be reduced. *See* S. REP., *supra* note 10, at 34-35; *In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 14-15 (E.D. Pa., July 2, 1974) (180-day decision).

[70] The USRA is authorized to issue up to $1 billion in government guaranteed obligations to Conrail. Since at least $500 million is earmarked for the rehabilitation and modernization of newly acquired rail properties, the maximum possible amount remaining for acquisition purposes is also only $500 million. *See* RRRA §§ 210(a), (b), 45 U.S.C. §§ 720(a), (b) (Supp. III, 1974). Estimates of the value of the Penn Central rail property likely to be conveyed run between $1.8 billion and $11.7 billion. *See* Affidavit of John W. Ingraham at 17, *In re* Penn Cent. Transp. Co., Bky. No. 70-347 (E.D. Pa., July 2, 1974) (180-day decision); *In re* Penn Cent. Transp. Co., No. 74-8, at 74 n.78 (Spec. Ct. RRRA, Sept. 30, 1974). It is clear, therefore, that the Conrail common stock will be the major source of recovery for creditors.

[71] RRRA § 303(c), 45 U.S.C. § 743(c) (Supp. III, 1974).

[72] *Id.* § 303(c)(2), 45 U.S.C. § 743(c)(2).

[73] *See* text accompanying notes 94-134 & 135-85 *infra.*

Judicial Involvement

Constitutional Litigation

The first and perhaps most threatening judicial challenge to what may be the long-awaited "light at the end of the tunnel"[74] arose when a three-judge district court in the Eastern District of Pennsylvania declared key sections of the Act unconstitutional and enjoined their enforcement. Numerous creditors of the Penn Central were significantly vindicated when the court, in *Connecticut General Insurance Corp. v. United States Railway Association*,[75] held that certain provisions of the RRRA did not sufficiently protect their interests.

More particularly, the court found that sections 303[76] and 304(f)[77] of the Act violated the fifth amendment's proscription against the taking of private property for governmental use without just compensation.[78] These sections mandated continued loss operations by the debtor railroad during the interim period pending implementation of the final system plan. However, during this period of unprofitability, creditors received no assurance of reimbursement for any erosion of railroad assets.[79] Since these assets represented the security for creditors' loans, the uncompensated erosion was deemed to be an unconstitutional taking.[80] The court reached its conclusion only after finding that the usual remedy for such confiscation — suit in the Court of Claims under the Tucker Act[81] — was precluded by the terms and legislative history of the RRRA.[82] The court, however, barred by the ripeness doctrine, refrained from deciding whether the creditors were also correct in alleging that the RRRA effects an additional unconstitutional taking by requiring conveyance of the debtors' properties to Conrail in exchange for Conrail stock and other of its securities.[83]

The government has directly appealed the *Connecticut General*

74 *Cf. In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 5 (E.D. Pa., May 2, 1974) (120-day decision).

75 Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, Civil No. 74-189 (E.D. Pa., June 25, 1974), *prob. juris. noted*, 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165) [hereinafter cited as Connecticut Gen.]. The suit for declaratory and injunctive relief was instituted by creditors of the Penn Central. Brief for Plaintiffs at 5.

76 45 U.S.C. § 743 (Supp. III, 1974).

77 *Id.* § 744(f).

78 "[N]or shall private property be taken for public use, *without just compensation.*" U.S. CONST. amend. V. (emphasis added).

79 *See* note 106 and accompanying text *infra.*

80 Connecticut Gen., *supra* note 75, at 49.

81 28 U.S.C. § 1491 (Supp. II, 1972). *See* note 186 and accompanying text *infra.*

82 Connecticut Gen., *supra* note 75, at 35-48.

83 *Id.* at 18. The reasons the court found the issues raised by the mandatory conveyance features not ripe for adjudication are summarized in note 142 *infra.*

decision to the Supreme Court.[84] In arriving at its disposition of the *Connecticut General* appeal, the Supreme Court will not be limited to the arguments proffered therein by the three-judge district court. In seeking to clarify the issues, the Court will be able to consider the treatment accorded these problems in much of the litigation which arose under the implementation proceedings of the RRRA.

RRRA Litigation

As previously discussed, the reorganization courts were to determine whether the railroads were reorganizable under the RRRA.[85] If so, the courts were to order the respective debtors to transfer their properties to Conrail. In considering four of the railroads, including the Penn Central, the district courts found reorganization under the RRRA to be inappropriate in that the Act did not provide a process which would be fair and equitable to the debtors' estates.[86] In each case, the courts employed a rationale similar to that expressed in *Connecticut General.*[87] As provided in the Act,[88] these decisions were appealed to the Special Court.[89]

Although the Special Court stayed its own order pending disposition of the *Connecticut General* appeal by the Supreme Court,[90] it struck a strong blow at the *Connecticut General* district court decision. In reversing the judgments of the four reorganization courts, the Special Court felt the Act provided a sufficiently fair and equitable process as regards the debtors' estates.[91] Unlike the court in *Connecticut General,* the Special Court found that a Tucker Act remedy was not precluded by the RRRA.[92] In so doing, it deemed that any constitutional infirmity

84 Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, *prob. juris. noted,* 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165).

85 *See* notes 60-63 and accompanying text *supra.*

86 *In re* Penn Cent. Transp. Co., Bky. No. 70-347 (E.D. Pa., July 2, 1974); *In re* Lehigh Valley R.R., No. 70-432 (E.D. Pa., July 2, 1974); *In re* Lehigh & H.R. Ry., No. 72 B 419 (S.D.N.Y., July 1, 1974); *In re* Central R.R., No. B.401-67 (D.N.J., June 28, 1974). *See* note 61 *supra.*

87 *See* cases cited in note 86 *supra.*

88 RRRA § 207(b), 45 U.S.C. § 717(b) (Supp. III, 1974).

89 *In re* Penn Cent. Transp. Co., No. 74-8 (Spec. Ct. RRRA, Sept. 30, 1974) [hereinafter cited as Special Court].

90 *Id.* at 116.

91 In arguing before the Special Court, the creditors contended that principles of collateral estoppel and res judicata barred the court from examining the merits of the government's position and mandated adherence to the *Connecticut General* decision. *See id.* at 32. The Special Court rejected this claim on two grounds. First, it noted that many of the parties to the present action supporting the validity of the RRRA, namely labor organizations and public bodies, were not parties to *Connecticut General.* Hence, they should not be collaterally estopped. Second, the court noted that the broad role Congress intended the Special Court to assume would be "trammeled" if it were bound by *Connecticut General. Id.* at 33.

92 *Id.* at 102.

arising under the fifth amendment would be adequately cured by the availability of this statutory provision.

The rather diverse holdings of the *Connecticut General* court and the Special Court suggest that the conflicts involved in the relevant doctrines require clarification. Resolution of these issues is crucial to the success of the RRRA and vital to the protection of the public interest in continued rail services. These very considerations apparently moved the Supreme Court, in docketing the Government's direct appeal of the *Connecticut General* decision, to expedite the argument of these issues.[93] The implications of the Supreme Court decision in the appeal of *Connecticut General,* however, may not be limited to the RRRA, the debtor railroads or even the hitherto vocal creditors. Rather, in deciding just how far Congress can proceed in fashioning a solution to the northeast rail crisis, the Court will have an opportunity to establish perimeters beyond which creditors' rights may not be made subservient to the public interest.

Obstacles to Implementation of the RRRA

To What Extent Can Unprofitable Interim Operations be Compelled?

In both the *Connecticut General* and RRRA court actions, the most pressing claim asserted by creditors has centered upon the daily losses incurred by virtue of the Act's enforcement.[94] The creditors have contended that unprofitable interim rail operations effectively erode the assets which form their security.[95] Efforts to obtain permission for discontinuance or abandonment to relieve such erosion appear futile because section 304(f) of the RRRA mandates continued operations pending implementation of the final system plan. Protecting the public interest from the possibility of termination, this section provides:

> After the date of enactment of this Act, no railroad in reorganization may discontinue service or abandon any line of railroad . . . unless it is authorized to do so by the [USRA] and unless no affected state

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93 In noting probable jurisdiction on October 9, 1974, the Court set the case down for argument on October 23, 1974. 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165).

94 The RRRA was enacted on January 2, 1974. *See* note 5 *supra.* From January to May 1974, the Penn Central lost $97.6 million, 7.8% above the loss for the corresponding period for 1973. N.Y. Times, July 2, 1974, at 49, col. 1. During the 3½ year period prior to December 1973, the Penn Central suffered $851 million in losses. The creditors anticipate that such losses will "continue unabated." Brief for Appellees at 70, Special Court, *supra* note 89. This expectation was apparently shared by the *Connecticut General* court, *see* Connecticut Gen., *supra* note 75, at 35, but was explicitly denied by the Special Court. Special Court, *supra* note 89, at 52-53.

95 *E.g.,* Brief for Appellees at 36-71, Special Court, *supra* note 89; Brief for Plaintiffs at 30-42, Connecticut Gen., *supra* note 75.

> or local or regional transportation authority reasonably opposes such action . . . .[96]

Noting that "reasonable" local opposition to abandonments will almost always exist, the Special Court correctly found that the qualifications imposed by this subsection *in fact* make abandonment virtually impossible.[97]

Concern over this alleged erosion of assets has led certain of the aggrieved parties to challenge the legality of mandating continued operations.[98] Such a requirement seemingly violates the doctrine of *Brooks-Scanlon Co. v. Railroad Commission*,[99] which allows discontinuance, notwithstanding public interest, when railroad operations can only be maintained at a loss. As the Supreme Court noted in *Bullock v. Railroad Commission*,[100] one of the so-called *Brooks-Scanlon* line of cases,[101] "to compel the [railroad] to keep on at a loss would be

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96 RRRA § 304(f), 45 U.S.C. § 744(f) (Supp. III, 1974). Under normal circumstances, the ICC is responsible for approving applications for abandonments and discontinuances. Interstate Commerce Act §§ 1(18), 13a, 49 U.S.C. §§ 1(18), 13a (1970). Since, however, § 304(f) mandates continued operations "notwithstanding any provision of any other Federal law . . . or the pendency of any proceedings before any Federal . . . court, agency, or authority," RRRA § 304(f), 45 U.S.C. § 744(f) (Supp. III, 1974), the authority of the ICC with respect to abandonments and discontinuances of railroads in reorganization in this region appears to have been superseded. Special Court, *supra* note 89, at 46.

Requiring that all abandonment applications be submitted to the USRA, a body particularly familiar with the final system plan, is analogous to consolidating reorganization proceedings before one special court. *Compare* RRRA § 304(f), 45 U.S.C. § 744(f) (Supp. III, 1974) *with id.* § 209(b), 45 U.S.C. § 719(b).

97 Special Court, *supra* note 89, at 45-47. Applications for abandonments may be approved by the ICC once it has determined "that the present or future public convenience and necessity [so] permit . . . ." Interstate Commerce Act § 1(18), 49 U.S.C. § 1(18) (1970). The Special Court commented that the "reasonable local opposition" standard set forth in § 304(f) allows for fewer abandonments or discontinuances than does the standard applied by the ICC. The court reasoned that so strict a standard was chosen "to avoid large inroads on the time of the USRA." Special Court, *supra* note 89, at 45-47. It is equally probable that this standard was adopted in the public interest to minimize the number of abandonments or discontinuances granted prior to implementation of the final system plan.

98 Brief for Appellees at 36-71, Special Court, *supra* note 89; Brief for Plaintiffs at 30-42, Connecticut Gen., *supra* note 75.

99 251 U.S. 396 (1920). In *Brooks-Scanlon*, the Railroad Commission argued that the responsibility imposed on a railroad enjoying the benefits of a state charter, *i.e.*, "common carrier responsibility," justifies mandated continued operations at a loss. The Supreme Court, however, disagreed. Even though the company was only doing a small business as a common carrier and the losses thereby incurred were offset by its other operations, the Court held that it could not compel the company "to spend any . . . money to maintain a railroad for the benefit of others who do not care to pay for it." *Id.* at 399. The improbability of future profitable operations was not explicitly mentioned as a criterion in the holding of *Brooks-Scanlon*. This consideration, however, became a key factor in later cases applying the doctrine. *See, e.g.*, Railroad Comm'n v. Eastern Tex. R.R. Co., 264 U.S. 79 (1924); Bullock v. Railroad Comm'n, 254 U.S. 513 (1921).

100 254 U.S. 513 (1921).

101 The *Brooks-Scanlon* line of cases is composed of *Brooks-Scanlon*, Bullock v. Rail-

an unconstitutional taking of its property."[102]

In defense of section 304(f), the USRA has emphasized that in *Continental Illinois National Bank & Trust Co. v. Chicago, Rock Island & Pacific Railroad*,[103] the *Brooks-Scanlon* doctrine was modified to permit continued operations for a reasonable time while a plan of reorganization is being formulated.[104] Under *Continental Illinois*, it appears that the likelihood of a successful reorganization, with its attendant preservation of the going concern value of the railroad and protection of creditors' claims, became a constitutionally acceptable reason to compel the railroad to keep on at a loss without presenting a taking under the fifth amendment.[105] Furthermore, by continuing operations, the public interest is more beneficially accommodated.

Conceding that the railroads may, under certain circumstances, be compelled to continue at a loss, creditors remain insistent that their assets are suffering erosion, and that the final system plan provides no assurance that such erosion will be compensated.[106] The pursuit of

road Comm'n, 254 U.S. 513 (1921), and Railroad Comm'n v. Eastern Tex. R.R., 264 U.S. 79 (1924). *See, e.g.*, Special Court, *supra* note 89, at 41.

102 254 U.S. at 521.

103 294 U.S. 648 (1935).

104 Brief for Appellants at 56, Special Court, *supra* note 89, at 56. The *Continental Illinois* decision upheld the constitutionality of § 77 of the Bankruptcy Act. 294 U.S. at 675. Although it held that creditors may be enjoined from selling their collateral, the Court contemplated "only a reasonable delay" in order to effectuate reorganization. *Id.* at 684-85. More importantly, the Supreme Court noted that the duration of this injunction should be left to the discretion of the district court, conceding that the erosion a creditor may suffer was not to be disregarded. *Id.* at 677.

Notably, the Court, in *Continental Illinois*, did sustain the restraint on the creditors as an exercise of the bankruptcy power. This, however, was predicated on the district court's power to protect its own jurisdiction until reorganization was accomplished. The Supreme Court reasoned that had the lower court not been able to enjoin the creditors from selling their collateral, reorganization would have been threatened and the jurisdiction of the court thereby defeated. Such a result would be contrary to both the equitable power inherent in a bankruptcy court to protect its own jurisdiction and the express power granted in § 77 to make those orders necessary to accomplish reorganization. *Id.* at 675-76. *Continental Illinois* does not, therefore, vitiate the Court's decision in Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935), that "[t]he bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." *Id.* at 589 (footnote omitted).

105 In the Penn Central Merger Cases, 389 U.S. 486 (1968), for example, the Supreme Court held that "the rights of the bondholders . . . do not dictate that rail operations vital to the Nation be jettisoned *despite the availability of a feasible alternative*." *Id.* at 510-11 (emphasis added). *Cf.* Central R.R. v. Manufacturers Hanover Trust Co., 421 F.2d 604 (3d Cir. 1970); *In re* Third Ave. Transit Corp., 198 F.2d 703 (2d Cir. 1952).

106 Creditors have taken little comfort in the fact that § 213 of the Act, 45 U.S.C. § 723 (Supp. III, 1974), authorizes the Secretary of Transportation to pay $85 million in emergency assistance to trustees of railroads in reorganization pending implementation of the final system plan. *See* note 66 and accompanying text *supra*. In light of estimates as to the amount and likelihood of erosion, *see, e.g.*, note 94 *supra*, it is not surprising that the *Connecticut General* court found this amount inadequate to meet a challenge of unconstitutionality. Connecticut Gen., *supra* note 75, at 26; *cf.* S. REP., *supra* note 10, at 16. The legislative history of the provision is further evidence that this sum was not

reorganization, they have argued, is not, of itself, the key to allowing interim operations at a loss. Rather, it is the likelihood that creditors' claims will be protected through a successful reorganization which justifies what would otherwise be an unconstitutional taking.[107] This argument appears well supported.[108] The public interest in continued operations, while always a factor in postponing the creditors' rights to terminate their investments,[109] cannot alone excuse an erosion of the creditors' security interests absent reimbursement. The fifth amendment clearly states that when private property is taken for public use, just compensation must be paid. Hence, to evaluate the constitution-

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intended to serve as an answer to constitutional objections. As reported, the interim assistance was solely "to assist the bankrupt carriers to continue operation pending the conveyance of their properties . . . ." H.R. REP., *supra* note 3, at 57. It was feared that the railroads would run out of operating cash. *Id.* No mention of eliminating or minimizing erosion was made.

There is, moreover, no provision in the RRRA requiring compensation for erosion. Even if the Supreme Court were to require such compensation, serious doubts as to the ability of Conrail to pay the stipulated amount have been raised. *See* note 145 and accompanying text *infra*. *See also* note 139 *infra*.

[107] Brief for Appellees before the Supreme Court at 52, Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, *prob. juris. noted*, 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165); Brief for Appellees at 45-49, Special Court, *supra* note 89.

[108] For purposes of effecting reorganization, creditors may be restrained from terminating their investment. Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. 648 (1935). In fact, preserving the "going concern" value of a railroad through interim operations leading to a reorganization has been deemed "inherently essential to the protection of the security of the mortgagee . . . ." *In re* Chicago, R.I. & Pac. Ry., 90 F.2d 312, 315 (7th Cir. 1937). This appears reasonable since typical § 77 proceedings in the past have not involved operations at a loss. *See* note 112 and accompanying text *infra*. Therefore, there was no conflict between the public interest and the creditors' interest. When interim operations do result in a substantial loss, however, a conflict arises. Because such massive erosion could drain the assets securing creditors' claims, the restraint on termination of their investment could be ended at the discretion of the district court. Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry. Co., 294 U.S. at 677. *See* note 104 *supra*. In order to distinguish erosion resulting merely from a postponement of creditors' rights (in order to effect a successful reorganization), from that amounting to an unconstitutional taking, standards to guide the district court in exercising its discretion are desirable. *See In re* Penn Cent. Transp. Co., 494 F.2d 270, 279 (3d Cir. 1974) (Columbus Option Cases), *cert. denied*, 43 U.S.L.W. 3213 (Oct. 9, 1974).

Protection of creditors from ultimate harm appears to be a prerequisite to action tending to erode assets securing creditors' claims. Various activities have been classified as requiring creditor protection. *See, e.g., In re* Penn Cent. Transp. Co., 494 F.2d 270, 279 (3d Cir. 1974) (Columbus Option Cases) (sale of property subject to lien of the United States increasing the prior lien on property securing creditors' claims); Central R.R. v. Manufacturers Hanover Trust Co., 421 F.2d 604 (3d Cir. 1970) (withdrawal of money from bondholders' account to pay for operating expenses); *cf. In re* Third Ave. Transit Corp., 198 F.2d 703 (2d Cir. 1952) (Chapter X proceeding) (first mortgage indenture trustees ordered to turn money over to reorganization trustee for operating expenses).

[109] *See, e.g.*, New Haven Inclusion Cases, 399 U.S. 392, 490-93 (1970), *criticized in* Note, *Takings and the Public Interest in Railroad Reorganization*, 82 YALE L.J. 1004 (1973); Penn-Central Merger Cases, 389 U.S. 486, 510-11 (1968); Reconstruction Fin. Corp. v. Denver & R.G.W.R.R., 328 U.S. 495, 535-36 (1946); Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648, 671-72 (1935).

ality of section 304(f), an understanding of interim erosion and a determination of the necessity for its compensation is required.

Both the actual losses and new debts arising from continued operations during reorganization proceedings are generally considered to constitute interim erosion.[110] As indicated by the Special Court, however, a precise definition of the term is noticeably lacking.[111] Since operations pending reorganization under traditional section 77 proceedings usually have not been at an actual loss, no absolute guidelines as to what constitutes erosion, and more particularly, what constitutes compensable erosion, have been established.[112]

Regrettably, the *Connecticut General* decision did not contribute to the clarification of this issue. Although the court, in discussing erosion, listed many of the claims filed against the debtor, it did not explain whether all or merely a portion of the listed claims or losses constituted erosion.[113] By holding that section 304(f) was unconstitutional "in requiring mandatory interim operations without providing a legal remedy to furnish fair and just compensation for an erosion of property beyond constitutional limits,"[114] the court established that "erosion beyond constitutional limits" must be compensated. However, it artfully avoided explaining to what degree, if any, erosion may be constitutionally permissible, *i.e.*, to what degree there may be erosion not requiring compensation.

The Special Court, unconvinced that erosion would develop, nevertheless made some attempt to reach a workable definition of erosion. Although the court admittedly had difficulty in deciding whether certain losses should be considered and how those losses should be computed, four particular items were set forth as constituting interim erosion:

> the issuance of trustees' certificates with liens superior to those of mortgage bonds, accumulation of property taxes which similarly prime such liens, accumulation of administration expenses which are entitled to priority over secured creditors, and use of cash or property held as security for liens to pay operating expenses.[115]

110 *See, e.g.*, Connecticut Gen., *supra* note 75, at 29-35; *In re* Penn Cent. Transp. Co., 355 F. Supp. 1343, 1344 (E.D. Pa. 1973).

111 Special Court, *supra* note 89, at 51.

112 *Id.* In earlier times, railroad revenues were sufficient to meet operating expenses and taxes; only the requirement to repay indebtedness resulted in insolvency. With such requirement suspended during reorganization proceedings, current expenses could be satisfied from current revenues. Today, however, railroads in reorganization have been unable to generate even the threshold level of revenues which would enable them to meet operating expenses. The result is erosion of the estate. *See id.* at 8.

113 *See* Connecticut Gen., *supra* note 75, at 29-35.

114 *Id.* at 49.

115 Special Court, *supra* note 89, at 51.

In addition, the court hinted that deprivation of return on capital, a key factor in all reorganizations, may also qualify as erosion.[116] By finding that the four enumerated conditions were not likely to develop prior to conveyance to Conrail,[117] however, the Special Court, like the three-judge panel in *Connecticut General*, may be considered as having avoided the more crucial question, *viz.*, whether all erosion requires adequate assurance of just compensation.

The Special Court's opinion might also be read as holding that erosion is permissible when confined within a reasonable time period. The court argued that since the 620-day period between enactment of the RRRA and mandatory conveyance to Conrail is no longer than the interval between the filing of an abandonment application with the ICC and its approval, section 304(f) cannot be unconstitutional.[118] In so reasoning, the court implies that some erosion without compensation is permissible. Arguably, however, since there is no assurance of just compensation for losses sustained during the abandonment process, it might well be unconstitutional to require a railroad to suffer uncompensated erosion pending ICC approval.[119] Recognizing this argument, but leaving it unaddressed,[120] the court appears to be satisfied that erosion is permissible, at least during the time an abandonment application may reasonably be pending.[121]

If, on the other hand, conveyance is long delayed, the court indicated that it would hold the Act deficient in that it lacks a provision for compensating erosion.[122] This dictum is consistent with the court's

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116 *Id.* at 55. Deprivation of return on capital usually is not considered in discussions of interim erosion, but its inclusion appears understandable in light of the record-high interest rates prevalent at the time of the decision. *See* N.Y. Times, Sept. 15, 1974, § 3, at 15, col. 1.

117 Special Court, *supra* note 89, at 53.

118 *Id.* at 47-49.

119 *See In re* Central R.R., 485 F.2d 208, 215 & n.42 (3d Cir. 1973) (en banc), *cert. denied*, 414 U.S. 1131 (1974). *See also id.* at 223-25 (Aldisert & Weis, J.J., dissenting).

120 The court stated that this point was not argued before it. Special Court, *supra* note 89, at 44 n.33. It noted, however, that

> delays of the magnitude here envisioned would test how long government can postpone the owner's withdrawal of his grant in the interest of carrying out regulatory policies . . . . But unless the Supreme Court should say something about this in the *Connecticut General* case, the very testing of such a position would take much time.

Id. at 49, n.40, *citing In re* Central R.R., 485 F.2d 208 (3d Cir. 1973) (en banc).

121 Similarly, it may be argued that the erosion suffered while a reorganization court decides that reorganization is not feasible is permissible and requires no compensation. However, in either of these instances, *i.e.*, while a petition for reorganization or a petition for abandonment is pending, the duration of the "decisional period" should be limited in order to avoid massive uncompensated erosion. *But see* New Haven Inclusion Cases, 399 U.S. 392, 491 (1970) (loss imposed on bondholders by time-consuming proceeding not unconstitutional under factual circumstances).

122 Special Court, *supra* note 89, at 55-57.

apparent holding that erosion may be permissible for a reasonable time,[123] but is confusing in light of the court's concern with deprivation of return on capital. Such deprivation, the court stated, although warranting serious consideration, is tolerable so long as there is a likelihood of reorganization.[124] Therefore, this category of erosion, in certain instances, would appear noncompensable notwithstanding the length of the period of interim operations pending reorganization. Consequently, the court seems to be establishing different compensation requirements for the differing types of erosion it recognizes.

In short, although the *Connecticut General* court found section 304(f) unconstitutional and the Special Court indicated it would hold likewise should the conveyance be long delayed, little clarification as to the meaning and import of interim erosion has been achieved. In addressing this issue, it is hoped the Supreme Court will more carefully define: (1) what constitutes interim erosion; (2) whether erosion is always a taking for purposes of the fifth amendment; and, if not, (3) to what degree and on what basis is uncompensated erosion permissible.

Since some interim period to effectuate a reorganization is always necessary, the Court will undoubtedly determine that creditors may reasonably be restrained from exercising their right to terminate their investment in a railroad operating at a loss.[125] However, the constitutional underpinning of this exception to the *Brooks-Scanlon* rule, which maintains that a railroad may not be compelled to operate at a loss, should be that ultimate reorganization will, in fact, benefit creditors and thus erosion actually will not have been suffered. When, as in the case of the RRRA, the likelihood of reorganization is not, of itself, assurance that no loss will be suffered,[126] it is submitted that other adequate assurances of just compensation should be required. To hold otherwise would be to countenance a taking of private property for public use despite the possibility of uncompensated loss. As noted above, although the public interest is best served by continued rail services, public interest alone cannot serve as justification for restraining creditors from terminating their investments. Such a holding would deprive railroad investors of the protection of the fifth amendment.

If the Supreme Court finds that interim erosion has already occurred or is likely to occur, section 304(f) may still be declared constitutional even if the Court holds that such erosion must be compensated. First, as suggested by the Special Court, a gloss may be added to section

123 *See* text accompanying notes 118-21 *supra.*

124 Special Court, *supra* note 89, at 55.

125 *See* text accompanying notes 103-05 *supra. See also* note 108 *supra.*

126 *See* note 106 and accompanying text *supra.*

304(f) permitting those abandonments necessary to preserve the constitutional rights of investors.[127] Since continued rail services are crucial to the nation's economy, this appears to be an undesirable rationale upon which to buttress the constitutionality of the section.[128] Second, the section may be deemed nonexclusive, thus permitting access to the ICC for permission for abandonment.[129] Since the approval of applications to the ICC may take considerable time,[130] however, more erosion may thereby be suffered. Consequently, this approach appears similarly undesirable and constitutionally suspect.[131] Moreover, it appears to clearly conflict with the statutory language.[132]

Two additional alternatives exist whereby the Court may deem section 304(f) constitutional despite a finding that interim erosion requires compensation. First, through the ultimate conveyance provisions, Conrail could be required to satisfy the creditors. However, this approach is acceptable only if Conrail is capable of making such payments. Second, the section may be saved if a remedy for an unconstitutional taking is found to exist against the United States in the Court of Claims under the Tucker Act.[133] The merits of each of these alternatives will be subsequently considered.[134]

Is Mandatory Conveyance to Conrail Constitutionally Justified?

Unquestionably, among the most novel provisions of the RRRA are those setting forth the processes culminating in the creation of Conrail.[135] Once a debtor has been committed to reorganization under the Act, a series of steps is set in motion leading inexorably to the conveyance of certain of the railroad's properties to this new corporation.[136] Since this mandatory transfer of rail properties must also be

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127 Special Court, *supra* note 89, at 49.

128 *See* notes 18-22 and accompanying text *supra*. Engrafting such a gloss, moreover, may complicate a railroad's qualification for emergency assistance for interim operations under § 213. *See* note 106 *supra*. Such grants are conditioned on the recipient's promise to "maintain and provide service at a level no less than that in effect on [Jan. 2, 1974]." RRRA § 213, 45 U.S.C. § 723 (Supp. III, 1974).

129 *See generally* note 96 *supra*.

130 Special Court, *supra* note 89, at 47-49.

131 *See* notes 119-21 and accompanying text *supra*.

132 *See* note 96 *supra*.

133 28 U.S.C. § 1491 (Supp. II, 1972).

134 *See* text accompanying notes 135-85 & 186-204 *infra*.

135 The purpose of this innovative process was articulated by the Senate Commerce Committee as follows:

> Because of the public interest in permitting [Conrail] to obtain all the rail properties it will need so that it may commence operations at the earliest practicable time, the special court is not given any discretion in making the order requiring conveyance.

S. REP., *supra* note 10, at 33. *See also* H.R. REP., *supra* note 3, at 24-25; 119 CONG. REC. 9729 (daily ed. Nov. 8, 1973) (remarks of Representative Staggers).

136 Debtor railroads were to have been committed to reorganization through trans-

"free and clear of any liens or encumbrances,"[137] the consideration to be received by such debtors' estates is of crucial significance to the now unsecured creditors. Having relinquished their security interest in the actual property by statutory dictate, these parties will be constrained to seek satisfaction of their claims from the proceeds received by the debtors. Notably, the Special Court's review of the terms of this exchange occurs only *after* the conveyance has been consummated.[138]

Section 206(d)(1) limits the consideration given in exchange for the debtor's assets to "stock and other securities of [Conrail]" including USRA obligations and certain other undefined benefits "accruing to such railroad by reason of such transfer."[139] A major contention of the

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ferring certain of their properties to Conrail in a two-stage judicial process. RRRA § 207(b), 45 U.S.C. § 717(b) (Supp. III, 1974). This process and the results thereof are outlined in notes 60-63 and accompanying text *supra*. The USRA, in the final system plan, is to designate which of the debtor's properties are to be conveyed. RRRA § 206(c), 45 U.S.C. § 716(c) (Supp. III, 1974). The final system plan will then be delivered to Congress and will be deemed approved unless either the House or the Senate passes a resolution to the contrary. *Id.* § 208(a), 45 U.S.C. § 718(a). Thereafter, Conrail must deposit with the Special Court the compensation designated in the final system plan as consideration for the rail assets to be conveyed. *Id.* § 303(a), 45 U.S.C. § 743(a). Within 10 days after the deposit:

> [t]he special court shall . . . order the trustee . . . of each railroad in reorganization in the region to convey forthwith to [Conrail] . . . all right, title, and interest in the rail properties of such railroad in reorganization . . . .

Id. § 303(b)(1), 45 U.S.C. § 743(b)(1). The conveyances to Conrail "shall not be restrained or enjoined by *any* court." *Id.* § 303(b)(2), 45 U.S.C. § 743(b)(2) (emphasis added).

Aware of the dangers implicit in a mandatory conveyance, Secretary of Transportation Brinegar recommended to the House Committee that the USRA be required to negotiate with the debtors prior to any transfer. In the event these suggested negotiations should fail, Secretary Brinegar would have then left it for the court to determine whether the USRA had made the best offer. Letter from Claude S. Brinegar, Secretary of Transportation to Harley O. Staggers, House Interstate and Foreign Commerce Comm., Oct. 1, 1973, in H.R. REP., *supra* note 3, at 65. Various members of the House Committee shared similar views. *See* H.R. REP., *supra* note 3, at 101 (supplemental views of Messrs. Devine, Harvey, Collins & Heinz). At no point in the statute as enacted, however, are means provided for direct opposition to the ultimate conveyance from either debtors' estates or investor interests.

[137] RRRA § 303(b)(2), 45 U.S.C. § 743(b)(2) (Supp. III, 1974).

[138] *Id.* § 303(c), 45 U.S.C. § 743(c).

[139] 45 U.S.C. § 716(d)(1) (Supp. III, 1974). The primary source of compensation to be paid the debtors clearly was intended to be the common stock of Conrail. *See* H.R. REP., *supra* note 3, at 49; note 70 *supra*. By utilizing common stock in this manner, it was believed that rail services could be continued without significant outlays of public money. H.R. REP., *supra* note 3, at 54; S. REP., *supra* note 10, at 18. In addition, payment primarily in common stock supposedly would enable the creditors to share in future profits. The House Committee hoped, moreover, that the profitability potential of the new rail corporation would thereby be enhanced since the operation would not be overly burdened with debt instruments and would not initially have to raise large sums of cash. H.R. REP., *supra* note 3, at 54, 57.

The use of, as well as the $500 million limitation upon, USRA guaranteed obligations, *see* note 70 *supra*, was based on the supposition that direct grants were unnecessary in light of the "excellent earnings prospects" of Conrail. S. REP., *supra* note 10, at 18. This congressional optimism, however, appears to have been unjustified. In its first annual report, the USRA concluded that Conrail "will have prospects for marginal profitability." Wall Street Journal, Nov. 14, 1974, at 22, col. 1. Since it was still not clear to the planners

secured creditors is that no justification exists for extinguishing their liens and limiting the source of their recovery primarily to Conrail securities of unproven value[140] without their first having the right to either withhold their approval from the final system plan or to obtain prior judicial scrutiny of its fairness. As was argued in the case of compulsory continuation of operations, the creditors allege that the Government is taking their property for the public's benefit in violation of the fifth amendment.[141]

A majority of the *Connecticut General* court found these issues not ripe for adjudication.[142] The Special Court, on the other hand, noted here a "serious challenge"[143] to the fairness of the Act and closely examined the relevant provisions. Neither the absence of a vote on the plan by the investors nor the requirement that they receive compensation in the form of Conrail securities, USRA obligations and other benefits was in and of itself particularly offensive to the Special Court. It justified these provisions as an exercise of the bankruptcy and commerce powers, albeit an extension of previously accepted limits.[144] Since, however, the court concluded that the creditors had cast considerable doubt upon the potential value of the consideration to be received, *i.e.*, the Conrail security package,[145] and since the court con-

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almost a year after enactment of the RRRA that a profitable Conrail could be created, it appears highly doubtful that a new railroad with "excellent" earnings is to be expected. The "other benefits" contemplated as part of the consideration to be paid the debtors' estates are discussed in note 69 *supra*.

140 *See* note 145 *infra*.

141 *See, e.g.*, Brief for Appellees before the Supreme Court at 109-12, Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, *prob. juris. noted*, 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165); Brief for Appellees at 71-96, Special Court, *supra* note 89.

142 Connecticut Gen., *supra* note 75, at 16. Judge Aldisert, in an opinion concurred in by Judge Bechtle, concluded that an allegation of unconstitutional taking based on the mandatory conveyance procedures of the Act was premature because three events necessary for plaintiffs to suffer harm had yet to occur. These contingencies included (1) committal of the debtors to the processes of the Act; (2) delivery and approval of the final system plan; and (3) conveyance to Conrail. *Id.* at 16-17. In his concurring opinion, Judge Fullam dissented on the issue of ripeness, reasoning that the constitutionality of the mandatory conveyance must be determined in order to correctly adjudge plaintiffs' contention that interim erosion was effecting a violation of the fifth amendment. *Id.* at 5. The contingencies the majority found barring justiciability did not trouble Judge Fullam. *Id.* at 1-5.

143 Special Court, *supra* note 89, at 57.

144 *Id.* at 105. The Special Court in part justified the mandatory conveyance provisions in the RRRA on the basis of the cram-down provision of § 77(e), 11 U.S.C. § 205(e) (1970). Special Court, *supra* note 89, at 105. *See* note 165 *infra*. The legislative history of the Act indicates that it was indeed partially patterned after this provision. *See* 119 CONG. REC. 9731 (daily ed. Nov. 8, 1973) (remarks of Representative Adams). The permissibility of requiring secured investors to receive stock in a plan of reorganization is discussed in the text accompanying notes 176-81 *infra*.

145 Special Court, *supra* note 89, at 69, 83. Writing for all three judges of the Special Court, Judge Friendly found the prospects of Conrail to be "sufficiently doubtful" to make

sidered a shortfall of consideration to be equivalent to an exercise of the power of eminent domain,[146] it examined the options available to correct any inadequacy should one develop. The court reasoned that mandatory conveyance in exchange for securities prior to judicial evaluation of the transfer would be acceptable only if "the means to rectify any unfairness"[147] subsequently found were available to the reviewing body.[148]

According to section 303(c)(2) of the Act,[149] should the consideration specified in the final system plan not "be fair and equitable to an estate of a railroad,"[150] the options available to the Special Court would

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it unfair to leave the creditors to the processes of the Act. *Id.* at 69; *cf. In re* Penn Cent. Transp. Co., Bky. No. 70-347 at 21 (E.D. Pa., July 2, 1974) (180-day decision). This conclusion was based on the Special Court's evaluation of extensive studies prepared by the investors, the Government, and certain transportation experts on behalf of other proponents of the Act. Special Court, *supra* note 30, at 71-83. The court also found, however, that the creditors did not successfully "demonstrate such a *certainty of failure* as to make it unfair and inequitable . . . to compel them to resort to the processes of the Act *if* recourse to the Tucker Act remains open." *Id.* at 69 (emphasis added). The availability of a remedy in the Court of Claims pursuant to the Tucker Act to cure the constitutional infirmities of the RRRA is discussed in the text accompanying notes 186-204 *infra*.

The court had noted earlier that absent a remedy under the Tucker Act, the Government, to justify mandatory conveyance prior to judicial scrutiny, would have to show that all the consideration contemplated in the RRRA "*clearly* would provide fair compensation." Special Court, *supra* note 89, at 68 (emphasis added). This statement appears to indicate that whatever action the reorganization power may justify, the creditors are entitled to assurance of "fair compensation" before they permanently lose their right to enforce their liens. The meaning of "fair compensation" is discussed in note 150 *infra*.

146 Special Court, *supra* note 89, at 105.

147 *Id.* at 59.

148 *Id.* at 59, 61-62.

149 45 U.S.C. § 743(c)(2) (Supp. III, 1974).

150 *Id.* The particular standard of fairness and equity intended in the Act is that applied by a court approving a reorganization plan submitted in a § 77 proceeding. *Id. See* Bankruptcy Act § 77(e), 11 U.S.C. § 205(e) (1970). Since no explicit definition of "fair and equitable" is set forth in § 77, an understanding of the phrase must derive from case law. Unfortunately, no precise judicial definition has been articulated. For purposes of corporate reorganizations, the Supreme Court has stated that the standard of fairness and equity is met "[s]o long as [the creditors] receive full compensatory treatment and so long as each group shares in the securities of the whole enterprise on an equitable basis . . . ." Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 530 (1941). Not unlike the Supreme Court in *Consolidated Rock*, other courts have treated in a general manner the "fair and equitable" requirement as applied to railroad reorganization plans. *See* 5 COLLIER, BANKRUPTCY ¶ 77.14 n.15, at 534-35 (14th ed. 1974) and cases cited therein. Although the "fair and equitable" finding in § 77 relates to the treatment of creditors, the finding to be made by the Special Court relates to the treatment of the debtors' estates.

In the original version of the RRRA passed by the House, the following definition appeared:

> The term "fair and equitable value" means, with reference to the rail properties of a railroad in reorganization which are to be acquired by [Conrail] . . . either the fair liquidation value or going concern value thereof as of September 30, 1973, as provided in the final system plan . . . . [F]air liquidation value is the best price that the then existing market could fairly be expected to provide for the sale of such rail properties over a reasonable period of time less the economic costs and expenses incident to holding and maintaining such properties over such time and to their disposition and less a reasonable discount for delay in receipt

be limited to (1) reallocating the securities among the various debtors;[151] (2) ordering the transfer of other securities of Conrail or USRA obligations as designated in the final system plan;[152] or (3) entering a deficiency judgment against Conrail.[153] Troubled by the efficacy of these limited options, particularly the value of a deficiency judgment against Conrail, the Special Court concluded that section 303(c)(2) "[failed] to supply an adequate tool with which to cure any deficiency in the consideration."[154] It concluded, therefore, that the mandated conveyance prior to judicial evaluation would be unfair absent a remedy against the United States in the Court of Claims pursuant to the Tucker Act.[155]

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of proceeds over such time; and going concern value is the capitalized value of the earning power of such properties projected over a reasonable period of time, giving due consideration to the effect and cost of implementation of the final system plan.

H.R. 9142, 93d Cong., 1st Sess. § 102(5) (1973). This definition was eliminated in conference with no explanation. *See* CONFERENCE REPORT, H.R. REP. No. 744, 93d Cong., 1st Sess. (1973). It appears, therefore, that Congress forfeited an opportunity to ease the burden likely to be imposed on the Special Court. When called upon to evaluate the properties conveyed to Conrail so that a determination of the fairness and equity of the final system plan may be entered, the court will be without standards to so act. Indeed, the Supreme Court recently noted that "valuation of the debtor's property" is central to a finding of fairness and equity. New Haven Inclusion Cases, 399 U.S. 392, 434 (1970).

151 RRRA § 303(c)(2)(A), 45 U.S.C. § 743(c)(2)(A) (Supp. III, 1974).

152 *Id.* § 303(c)(2)(B), 45 U.S.C. § 743(c)(2)(B). Since the option afforded the Special Court by subsection A provides for a reallocation of securities, the intent of this second option authorizing transference of designated securities or obligations is unclear. Meaning can be attributed the subsection in either of two ways. First, it may be assumed that the final system plan will designate a reserve amount of securities and obligations, not touched by the court in a reallocation under subsection A, from which the court could transfer additional consideration to the debtors' estates under subsection B. Alternatively, it may be assumed that the maximum $500 million in government obligations will not be allocated in the final system plan. The court could transfer these obligations, however, only if the qualifying phrase—"as designated in the final system plan"—is disregarded. *See* Special Court, *supra* note 89, at 63 n.64. *But see In re* Lehigh Valley R.R., Bky. No. 70-432, at 2 (E.D. Pa., July 2, 1974) (180-day decision). For this second alternative to be viable, it is essential to assume that not all of the government obligations will be allocated in the plan, since additional obligations of the USRA are available only through joint resolution of Congress. RRRA § 210(b), 45 U.S.C. § 720(b) (Supp. III, 1974).

153 RRRA § 303(c)(2)(C), 45 U.S.C. § 743(c)(2)(C) (Supp. III, 1974). The usefulness of a deficiency judgment against Conrail is highly questionable. *See, e.g.*, Special Court, *supra* note 89, at 67 (judgment inadequate tool to cure any deficiency); Connecticut Gen., *supra* note 75, at 20 (Fullam, J., concurring) (if Conrail stock is inadequate, deficiency judgment "would be essentially circuitous"); *In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 13 (E.D. Pa., July 2, 1974) (180-day decision) (Fullam, J.) (deficiency judgment is "relatively pointless" since it would lower the value of the common stock). The legislative history of this provision is set forth by the Special Court. Special Court, *supra* note 89, at 64 & n.67.

154 Special Court, *supra* note 89, at 67. *See id.* 62-67. In addition, the court estimated that it would take a few years before an educated judgment as to the fairness and equity of the terms of the conveyance could be entered. Special Court, *supra* note 89, at 57-58, 66. *But see* 119 CONG. REC. 9742 (daily ed. Nov. 8, 1973) (remarks of Representative Adams) (judgment could take 5-10 years).

155 Special Court, *supra* note 89, at 83. See notes 186-204 and accompanying text *infra* for a discussion of the nature and availability of a remedy against the United States in the Court of Claims.

It found such a remedy was not precluded,[156] however, and was therefore able to avoid striking down the RRRA on fifth amendment grounds.

Nevertheless, by calling a shortfall an exercise of eminent domain, the Special Court in effect stated that it is beyond the reorganization power — and thus a violation of the fifth amendment — to compel a debtor to transfer its properties in exchange for securities of unknown value. This deficiency was capable of remedy, however, by either prior judicial scrutiny of the terms of the transfer or adequate assurance that any shortfall could be cured.[157]

Admittedly, the operation of the Act is strikingly similar to an exercise of eminent domain.[158] In compliance with government mandate, secured creditors relinquish the right to enforce their liens[159] so that rail assets may be transferred to Conrail for an express public purpose.[160] Furthermore, once a reorganization court has determined that a debtor will be reorganized under the RRRA, its creditors are irretrievably committed to the Act's processes with no opportunity to prevent the mandated conveyance by withholding their consent.[161] In view of these apparent deprivations of property interests, the creditors argue that the measure of their compensation should not be a package of Conrail securities of speculative value, but rather, should consist of the forms of reimbursement traditionally required when eminent domain is exercised, *viz.*, assurance of compensation in cash or its equivalent.[162]

However attractive the analogy to eminent domain may be, its reasoning appears overly simplistic in that it disregards any justification

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156 Special Court, *supra* note 89, at 102.

157 *See* Special Court, *supra* note 89, at 69, 105. The unlikelihood that the processes of the RRRA would enable the court to cure any shortfall is discussed in notes 149-54 and accompanying text *supra*.

158 Eminent domain is the power to take for the public benefit without the owner's consent. 1 NICHOLS, EMINENT DOMAIN § 1.11, at 1-5 (rev. 3d ed. 1974).

159 *See* RRRA § 303(b)(2), 45 U.S.C. § 743(b)(2) (Supp. III, 1974).

160 *Id.* § 101(b)(2), 45 U.S.C. § 701(b)(2).

161 *See* note 136 *supra*.

162 *See, e.g.*, Brief for Appellees before the Supreme Court at 112, Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, *prob. juris. noted*, 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165); Brief for Appellees at 72, Special Court, *supra* note 89. The contention of the creditors that cash compensation is constitutionally required is widely accepted, *see* 3 NICHOLS, EMINENT DOMAIN § 8.2 (rev. 3d ed. 1974), but not universally followed. *See, e.g.*, United States v. 1,000 Acres of Land, 162 F. Supp. 219, 221 (E.D. La. 1958); United States *ex rel.* TVA v. Indian Creek Marble Co., 40 F. Supp. 811, 819 (E.D. Tenn. 1941). If it should be decided that the RRRA is an exercise of eminent domain, it must be determined whether the fifth amendment requires that compensation be in cash. As noted by the Special Court, "[N]o Supreme Court case has ever turned on [this] question . . . ." Special Court, *supra* note 89, at 104.

for those processes of the Act emanating from the bankruptcy power. Only by examining the constitutionally tested powers traditionally utilized under section 77 to effect reorganization of a bankrupt railroad can one accurately determine the constitutional basis, if any, for the forced transfer aspects of the RRRA.[163] Such an evaluation requires the resolution of several important issues. First, if in fact the RRRA is a valid exercise of the bankruptcy power, is it extending the previously unquestioned confines of that power? Second, if it does so, does the fifth amendment set a boundary beyond which reorganization cannot be used to justify subservience of the interests of secured creditors to those of the public in continued rail services? Finally, assuming the fifth amendment sets such a boundary, can the courts, pursuant to the RRRA, protect the creditors from governmental encroachments inherent in the processes of the Act?

Arguably, the RRRA deviates from section 77 by eliminating the requirement that a judicially approved plan of reorganization "be submitted . . . to the creditors of each class . . . for acceptance or rejection . . . ."[164] At first blush, such deviation may be more apparent than real in view of the constitutionally tested "cram-down" provision of section 77(e), which permits judicial confirmation of a plan notwithstanding rejection by the creditors.[165] This cram-down is permissible, however, only if the court finds that the creditors' refusal to approve the plan is not "reasonably justified," and that the plan itself is "fair and equitable."[166] To the extent the RRRA deprives the creditors, in

163 In *Connecticut General*, Judge Fullam undertook a comparison between the "pertinent provisions" of the RRRA and the concepts of sale, reorganization, and eminent domain. *See* Connecticut Gen., *supra* note 75, at 16-20 (Fullam, J., concurring).

164 Bankruptcy Act § 77(e), 11 U.S.C. § 205(e) (1970). However, the reorganization plan need not be submitted to a class of creditors if, for example, the court agrees "that the interests of such class of creditors will not be adversely and materially affected by the plan . . . ." *Id.* There is little doubt that the creditor-plaintiffs involved in the RRRA litigation are at least materially affected.

165 *Id.* The so-called "cram-down" provision enables a judge to

> confirm the plan if he is satisfied and finds, after hearing, that it makes adequate provision for fair and equitable treatment for the interests or claims of those rejecting it; [and] that such rejection is not reasonably justified in the light of the respective rights and interests of those rejecting it and all the relevant facts . . . .

Id. The cram-down provision was upheld in Reconstruction Fin. Corp. v. Denver & R.G.W.R.R., 328 U.S. 495, 533 (1946).

In addition to its reliance on the cram-down provision, the Special Court in part justifies the absence of investor participation prior to conveyance on the basis of Continental Ill. Nat'l Bank & Trust Co. v. Chicago, R.I. & Pac. Ry., 294 U.S. 648 (1935). Special Court, *supra* note 89, at 105. In *Continental Illinois*, the Supreme Court indicated that the bankruptcy power possibly could extend "into a field whose boundaries may not yet be fully revealed." 294 U.S. at 671. It must therefore be determined whether eliminating investor participation prior to implementation of a plan is one of the permissible extensions alluded to in *Continental Illinois*.

166 Bankruptcy Act § 77(e), 11 U.S.C. § 205(e) (1970). The meaning of "fair and equitable" is discussed in note 150 *supra*.

the first instance, of the opportunity to "reasonably" disapprove the final system plan and thus delay conveyance to Conrail,[167] it appears to extend beyond the cram-down provision of section 77(e). It remains to be determined whether this particular departure, purportedly justified as protecting the public interest in uninterrupted rail services, is of constitutional significance resulting in a violation of the fifth amendment.

The process contemplated by the RRRA further exceeds the perimeters of the cram-down provision by postponing any judicial review until after conveyance.[168] The *New Haven Inclusion Cases*,[169] however, might appear to provide a precedent for such postponement. There, the properties of the New Haven Railroad were conveyed to the Penn Central before a price was ascertained.[170] Implicit in the transaction, however, was the belief that the compensation necessary to meet the requirements of section 77 could be provided by the newly-merged Penn Central.[171] Subsequent to the conveyance, the courts having jurisdiction over the New Haven could order additional compensation to be paid by the Penn Central. Such power was significant since the Penn Central was believed capable of satisfying any eventual judgment.[172] It appears, therefore, that the analogy between the RRRA and the *New Haven Inclusion Cases* fails on this basis. Under section 303(c)(2) of the RRRA, recovery from Conrail is limited to the consideration specified in the final system plan plus a deficiency judgment which would be of value only if there were some likelihood of satisfaction.[173] A serious question exists in regard to both the value of the

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167 *See* note 136 *supra*.

168 RRRA § 303(c), 45 U.S.C. § 743(c) (Supp. III, 1974).

169 399 U.S. 392 (1970).

170 *See id.* at 413-18. The legislative history of the RRRA reveals that the *New Haven Inclusion Cases* was used as a model. *See, e.g.*, 119 CONG. REC. 9731 (daily ed. Nov. 8, 1973) (remarks of Representative Adams). Unlike the procedure prescribed in the RRRA, a tentative price for the New Haven was established prior to its conveyance. *See* 399 U.S. at 413-18.

171 The plan approved by the district court was predicated on the ICC's finding that the intrinsic value of Penn Central stock would increase and be reflected in a price of $87.50 per share by the time the benefits of the merger were realized. In addition, the Penn Central was to indemnify the New Haven in cash for that part of the predicted value not reached. *See In re* New York, N.H. & H.R.R., 304 F. Supp. 793, 808-10 (D. Conn. 1969); New Haven Inclusion Cases, 399 U.S. at 483-89. The Supreme Court noted that it would have agreed with the plan "[o]n the basis of the record before the District Court at the time of its order . . . ." *Id.* at 488. By the time the case reached the Supreme Court, however, the Penn Central had deteriorated to the brink of bankruptcy. In accordance with the "fair and equitable" treatment to which the New Haven was entitled, the Court could not approve a transfer for a "payment . . . only a fraction of its purported value." *Id.*

172 *See* note 171 *supra*.

173 *See* notes 149-54 and accompanying text *supra*.

Conrail stock[174] which will constitute a substantial part of the consideration and the value or efficacy of the deficiency judgment.[175]

The use of stock is not per se a departure from ordinary reorganization procedures and finds additional precedent in the *New Haven Inclusion Cases*,[176] where a substantial part of the purchase price for the New Haven was permitted to be paid in Penn Central stock.[177] Moreover, courts presiding over section 77 reorganizations have routinely approved plans in which creditors were required to surrender their claims in exchange for inferior securities.[178] In such cases, however, courts have uniformly required that the absolute priority rule be followed, *i.e.*, that the highest class of creditors be fully satisfied before the next class receives its share.[179] Under the RRRA, the consideration received from Conrail after conveyance will be transferred to the debtors' estates rather than directly to creditors; thereafter, reorganization courts will be charged with distributing these securities to creditors under plans of reorganization for each debtor.[180] There is no reason to speculate that the absolute priority rule will not be followed and that the compensation allotted in the final system plan will not be distributed in accordance with traditional reorganization procedures.[181] However, the unproven value of the stock to be exchanged, coupled with a cram-down-like conveyance absent any prior judicial scrutiny, casts doubt upon what might otherwise be the permissible use of stock in a reorganization plan.

Based on the foregoing, it is apparent that the RRRA extends beyond the traditional reorganization framework. Certainly, the public interest in continued rail services must be considered in evaluating the constitutionality of these departures. If the mandates of the fifth amendment are not to be ignored, however, a definitive boundary must

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174 *See* note 145 *supra*.

175 *See* note 153 *supra*.

176 399 U.S. 392 (1970). *See* 119 CONG. REC. 9731 (daily ed. Nov. 8, 1973) (remarks of Representative Adams).

177 *See* 399 U.S. at 483-84; Connecticut Gen., *supra* note 75, at 17 (Fullam, J., concurring).

178 *See, e.g.*, Group of Institutional Investors v. Chicago, Mil., St. P. & Pac. R.R., 318 U.S. 523, 534-35 (1943); Ecker v. Western Pac. R.R., 318 U.S. 448, 476-77, 484 (1943); *cf.* Consolidated Rock Prods. Co. v. Du Bois, 312 U.S. 510, 528 (1941); Wright v. Union Cent. Life Ins. Co., 311 U.S. 273 (1940).

179 *See, e.g.*, Case v. Los Angeles Lumber Prods., 308 U.S. 106, 115-22 (1939); Northern Pac. Ry. v. Boyd, 228 U.S. 482 (1913). *See generally* 5 COLLIER, BANKRUPTCY ¶ 77.14 n.15, at 530-32 (14th ed. 1974); Lasdon, *supra* note 29, at 540-43.

180 *See In re* Penn Cent. Transp. Co., Bky. No. 70-347, at 14 (E.D. Pa., July 2, 1974) (180-day decision).

181 Therefore, as the Special Court concluded, the use of stock and other securities as payment for the transferred rail assets is not in itself improper. Special Court, *supra* note 89, at 105.

be established so that acceptable reorganization power may be distinguished from an exercise of power which improperly serves the public interest at the expense of creditors.

It is suggested, therefore, that the compensation limitations imposed on the court by section 303(c)(2) and the questionable availability of any creditworthy source to satisfy a court-ordered payment seriously impair the constitutionality of the mandatory conveyance provisions of the RRRA. Concededly, it may be proper to impose the transfer on the secured creditors without either their participation or prior judicial review of the terms of conveyance. Nevertheless, it appears to border too closely upon a violation of the fifth amendment to so act without at least an assurance, similar to that provided in the section 77 cramdown provision, that the adopted plan has been found likely to produce a result which is fair and equitable.

To remedy the present situation, the Special Court could preliminarily review the final system plan and postpone the conveyance should it find that adequate consideration is not provided.[182] As the Special Court noted, however, such delay would defeat the purposes of the RRRA and return the railroads to the situation in which they found themselves prior to its enactment.[183] Alternatively, it has been argued that Conrail could issue more secured debt obligations to fairly compensate the debtors' estates.[184] Issuing such obligations, however, would decrease the value of the Conrail stock present in the exchange and thus fail to achieve a more desirable result. Since it is unlikely that Congress will voluntarily authorize the government to guarantee additional USRA obligations,[185] one way to assure a fair and equitable result is to impose liability upon the United States, through use of the Tucker Act, to the extent that the value of consideration received by any debtor from Conrail is less than the value necessary to compensate it for the assets conveyed. Although this alternative may burden the public treasury, it appears the least objectionable method whereby, through the protection of creditors' rights, the mandatory conveyance provisions central to the success of the RRRA may be retained.

The Tucker Act as an Available Remedy

The Tucker Act grants jurisdiction to the Court of Claims to render judgments against the United States in actions "founded . . .

182 *See id.* at 67.
183 *Id.* at 67-68.
184 *See, e.g.*, Brief for Appellants at 85, Special Court, *supra* note 89.
185 *See* note 192 and accompanying text *infra*.

upon the Constitution."[186] Despite government assertions that the future availability of a Tucker Act remedy constitutes a present cure for any compensation shortcomings of the RRRA,[187] creditors have contended that Congress precluded access by aggrieved parties to the Court of Claims.[188] Whether or not such access is ultimately permitted, it is submitted that its availability should not, as a matter of law, be dispositive of the constitutionality of the RRRA. What must also be considered is whether the Tucker Act is a desirable and proper method of bolstering the dubious, or at least fragile, constitutional support on which the compelled loss operations[189] and the mandatory conveyance provisions[190] of the RRRA now stand.

Both the *Connecticut General* court and the Special Court considered the availability of a remedy under the Tucker Act for action taken pursuant to the RRRA. The court in *Connecticut General* determined that Congress had closed the doors of the Court of Claims to railroad creditors.[191] In part, the court reached its decision through reliance upon the legislative history of the RRRA, which made it abundantly clear that Congress had intended to rescue the railroads without heavily drawing upon the public coffers.[192] Additionally, the court relied upon

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186 The Tucker Act, in pertinent part, provides:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress . . . .

28 U.S.C. § 1491 (Supp. II, 1972).

187 *E.g.*, Brief for Appellants at 30-51, Special Court, *supra* note 89; Brief for Defendants at 78-94, Connecticut Gen., *supra* note 75.

188 *E.g.*, Brief for Appellees at 96-113, Special Court, *supra* note 89; Brief for Plaintiffs at 58-69, Connecticut Gen., *supra* note 75.

189 *See* text accompanying notes 94-134 *supra*.

190 *See* text accompanying notes 135-85 *supra*.

191 Connecticut Gen., *supra* note 75, at 48.

192 During debate on the floor of the House, many representatives evidenced their concern as to the ultimate cost to the taxpayers of the RRRA's provisions. *See* 119 CONG. REC. 9729-52 (daily ed. Nov. 8, 1973) (debate on H.R. 9142); *id.* at 11,873-76 (daily ed. Dec. 20, 1973) (debate on CONFERENCE REPORT, H.R. REP. No. 744, 93d Cong., 1st Sess. (1973)). Illustrative of this concern is the colloquy between two of the Managers on the Part of the House after the Conference Report was introduced:

> MR. KUYKENDALL. Mr. Speaker, I would like to ask the gentleman from Washington to clarify one point, and that is the matter of the deficiency judgment. There was a lot of colloquy in the original debate which expressed fears that the Federal court had the key to the Treasury.
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> Will the gentleman give us his interpretation of the guarantees we have to keep that from happening in the court proceedings?
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> MR. ADAMS. Mr. Speaker, there is a definite limitation on the total amount that can be authorized under this bill. Any amounts that go beyond that, or the shifting of the way in which it is spent, is to be approved by an act of Congress, to be signed by the President . . . . [I]t was the clear intent of the managers that any amount other than common stock was to be at the lowest possible limit to meet the constitutional guarantees.
>
> . . . .
>
> MR. KUYKENDALL. There is no way the Federal court may assess the taxpayers or this Congress on the judgments of the creditors; is that correct?

particular provisions in the Act limiting appropriations available thereunder.[193] Thus, it was deemed impermissible to utilize government funds as a source for satisfaction of judgments in favor of creditors. However, the Special Court, in finding that such remedial action was not precluded,[194] pointed out that any express provision foreclosing access to the Court of Claims is blatantly absent from the RRRA.[195] This absence is particularly significant since an entire section in the Act is devoted to setting forth those laws which are inapplicable to it.[196] In this section, no mention of the Tucker Act is made.

As the Special Court correctly found, accepted rules of statutory construction indicate that access to the Court of Claims in this instance does not appear unwarranted.[197] Assuming the availability of a remedy in the Court of Claims would answer assertions of unconstitutionality,[198]

MR. ADAMS. The gentleman is correct.

MR. KUYKENDALL. There is no way they can assess the Congress for the money?

MR. ADAMS. The gentleman is correct.

Id. at 11,876.

The use of a § 77 reorganization framework instead of condemnation appears to have been partially motivated by a desire to minimize the necessary expenditures of the federal government. A particular example of congressional frugality is the decision not to underwrite any of the Conrail stock. The Senate Report on S. 2767 explained that section 206(i) would allow for "[s]ome form of Federal guarantee of the value of [Conrail] stock . . . ." S. REP., *supra* note 10, at 28. This provision was deleted in conference. CONFERENCE REPORT, H.R. REP. No. 744, 93d Cong., 1st Sess. 56 (1973).

The appropriations authorized under the RRRA are limited to $558.5 million. 119 CONG. REC. 23,778 (daily ed. Dec. 21, 1973) (remarks of Senator Hartke). *See* note 193 *infra*. Those in Congress who supported the RRRA have continued to evidence resistance to paying any additional amounts beyond the provisions of the Act. *See* Brief for Certain United States Representatives as Amicus Curiae before the Supreme Court, Connecticut Gen. Ins. Corp. v. United States Ry. Ass'n, *prob. juris. noted*, 43 U.S.L.W. 3206 (U.S. Oct. 9, 1974) (No. 74-165).

193 Connecticut Gen., *supra* note 75, at 45, 46-47. *See, e.g.*, RRRA § 213(b), 45 U.S.C. § 723(b) (Supp. III, 1974) ($85 million ceiling on appropriations for emergency assistance); *id.* § 214(a), 45 U.S.C. § 724(a) ($12.5 million ceiling on appropriations to Secretary of Transportation); *id.* § 214(b), 45 U.S.C. § 724(b) ($5 million ceiling on appropriations to ICC for use of Rail Services Planning Office); *id.* § 214(c), 45 U.S.C. § 724(c) ($26 million ceiling on appropriations to USRA for administrative expenses); *id.* § 215, 45 U.S.C. § 725 ($150 million ceiling on USRA obligations).

194 Special Court, *supra* note 89, at 102.

195 *Id.* at 88.

196 RRRA § 601, 45 U.S.C. § 791 (Supp. III, 1974). This section specifies those provisions of the antitrust laws, the Interstate Commerce Act, the Bankruptcy Act, and the National Environmental Policy Act of 1969 which are inapplicable to certain action taken pursuant to the RRRA. In addition, as noted by the Special Court, "[t]en other sections of the Act [§§ 202(a)(10); 205(c)(2); 206(d)(3); 207(b); 209(a); 209(b); 303(b)(2); 303(d); 304(c); 304(f)] rule out, in whole or in part, the applicability of various statutes." Special Court, *supra* note 89, at 88 & n.93.

197 Special Court, *supra* note 89, at 92-93.

198 This assumption has been shared by the Special Court and a majority of the court in *Connecticut General*. *See* Special Court, *supra* note 89, at 56-57, 83; Connecticut Gen., *supra* note 75, at 35-48. Judge Fullam in *Connecticut General*, however, questioned the adequacy of a Tucker Act remedy to meet constitutional infirmities of the RRRA. *Id.* at 23 (Fullam, J., concurring).

one must question the approach used by the *Connecticut General* court in ruling out this remedy and, as a consequence, holding the RRRA unconstitutional. It appears to be a departure from principles of statutory construction to resort to legislative history to strike down a statute as unconstitutional. Even ambiguous statutes are to be construed as constitutional where such reading is fairly possible.[199] In addition, repeals by implication are not favored in the law.[200] Therefore, it would be especially incongruous to find a partial implied repeal of the Tucker Act, insofar as action taken pursuant to the RRRA is involved, thus resulting in the unconstitutionality of a major piece of legislation. If the Supreme Court were to invalidate the challenged provisions of the RRRA on the grounds that the Tucker Act remedy had been foreclosed, it would, in fact, be establishing the unconstitutionality of a statute based on legislative history and language which limits appropriations under the Act. Only questionable preemptive meaning can be attributed to either of these factors. Such a departure from accepted principles of statutory construction would appear to be both unwise and unwarranted since, had Congress wished, a provision specifically foreclosing access to the Court of Claims could easily have been inserted in the Act.[201]

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199 When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is *fairly possible* by which the question may be avoided.

Crowell v. Benson, 285 U.S. 22, 62 (1932) (emphasis added) (footnote omitted). *See* United States v. Thirty-Seven Photographs, 402 U.S. 363, 369 (1971); 2A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 45.11 (4th ed. 1973).

It is, of course, arguable that the RRRA is unambiguous in that the Tucker Act remedy is not explicitly foreclosed.

200 *See, e.g.*, Morton v. Mancari, 417 U.S. 535, 549-50 (1974); Amell v. United States, 384 U.S. 158, 165-66 (1966); FTC v. A.P.W. Paper Co., 328 U.S. 193, 202 (1946).

The presumption against implied repeals is classically founded upon the doctrine that the legislature is presumed to envision the whole body of the law when it enacts new legislation, and, therefore, if a repeal of the prior law is intended, expressly to designate the offending provisions rather than to leave the repeal to arise by necessary implication from the later enactment.

1A C. SANDS, STATUTES AND STATUTORY CONSTRUCTION § 23.10, at 231 (4th ed. 1972) (footnote omitted).

201 To buttress the arguments of those maintaining that Congress did not intend the RRRA to preclude access to the Court of Claims, it has been alternatively suggested that the absence of any provision expressly denying such access may evidence the fact that Congress simply did not consider it. Special Court, *supra* note 89, at 87-88. Arguably, the remarks of Senator Hartke evidence some congressional thought as to a Tucker Act remedy:

If we did nothing while continuing to mandate rail service, there is the distinct possibility in view of the prior action of Congress that a number of [the creditors] could make a claim against the Government which could be sustained in the Court of Claims.

119 CONG. REC. 23,783-84 (daily ed. Dec. 21, 1973). These remarks, however, were part of an explanation of the terms of the exchange for rail properties as provided in the RRRA. It is likely that Senator Hartke and others considered these terms adequate and consequently ignored any necessity for a remedy in the Court of Claims. This reasoning is supported by the statement of the House Committee that they believed

The decision of the court in *Connecticut General* may be criticized on an additional ground. It is clear that Congress sought to limit the burdensome effect that reorganization could have on the public treasury. However, limitations imposed on appropriations under the Act do not necessarily imply that Congress could not subsequently appropriate moneys needed to meet a judgment entered by the Court of Claims.[202] Therefore, it would appear that the arguments set forth in *Connecticut General* are, in and of themselves, insufficient to justify the finding that access to the Court of Claims has been precluded.

Even though a Tucker Act remedy appears to be available, several legal and practical difficulties are presented if this availability becomes the sole basis for upholding the RRRA's constitutionality. First, it is unlikely that the Tucker Act was intended to prospectively insure the propriety of all questionable legislation.[203] Second, the creditors and debtors' trustees would be compelled to relitigate many of the issues propounded in *Connecticut General* and the cases under the RRRA if they are, in effect, forced to start afresh in the Court of Claims after conveyance. Finally, the serious constitutional questions posed by the RRRA could remain unaddressed by the Supreme Court at least until they may be raised again should the decision of the Court of Claims be reviewed.

Nevertheless, in the case of the RRRA, the Supreme Court may, without necessarily creating a dangerous precedent, buttress a finding of constitutionality on the presence of a Tucker Act remedy. In so doing, the Court should attempt to place its holding on a narrow basis

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> that [the] provisions of this title of the Act, and especially the provision for deficiency judgment and payment of obligations of the Association . . . are more than adequate to guarantee that the creditors of the bankrupt railroad will receive all that they may Constitutionally claim.

H.R. REP., *supra* note 3, at 55. In light of this congressional confidence in the ability of the Act's compensation provisions to adequately provide for the debtors' estates, it appears reasonable to conclude that the necessity of a remedy in the Court of Claims was not considered.

202 The Constitution provides, "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ." Art. I, § 9, cl. 7. Notably, Congress could refuse to appropriate funds necessary to satisfy a judgment rendered by the Court of Claims. *Compare* 31 U.S.C. § 724a (1970), *with* 28 U.S.C. § 2518 (1970). As the Special Court observed, however, the availability of a judgment in the Court of Claims should be adequate assurance of future compensation since "'there seems to be no sound reason why the Court of Claims may not rely on the good faith of the United States.'" Special Court, *supra* note 89, at 111 n.118, *quoting* Glidden Co. v. Zdanok, 370 U.S. 530, 571 (1962).

203 The Tucker Act appears to be primarily designed as a waiver of sovereign immunity conferring jurisdiction on the Court of Claims to consider claims against the United States. *See* Sioux City & St. P. R.R. v. United States, 36 F. 610 (C.C.N.D. Iowa 1888). "[T]he only purpose of the Act was to remove the bar of the non-suability of the United States . . . ." *Id.* at 613.

applicable to the facts before it. Any general statement proclaiming the Tucker Act available to sustain every improper congressional action in the economic sphere should be avoided. Furthermore, if the Supreme Court sets forth appropriate guidelines, the issues posed by the RRRA need not be fully relitigated since the Court of Claims, and other lower courts, would be expected to follow the Court's opinion. Because the fifth amendment does not require that compensation precede taking,[204] remitting the creditors to a remedy in the Court of Claims, although not entirely desirable, seems to be the best method for saving the constitutionality of a statute necessary to sustain rail services essential to the economy of the nation.

CONCLUSION

Once the gravity of the northeast rail crisis became apparent, Congress acted promptly to produce the RRRA. The Act represents a sincere legislative effort to rescue the bankrupt northeastern railroads from financial disaster and to provide a functional statutory framework through which successful future operations might be designed. It is unfortunate that serious legal challenges have impeded implementation of this much-needed, creative legislative response. Yet, it must be noted that should the processes of the RRRA, as enacted, ultimately be upheld and the Tucker Act remedy found unavailable, the result would be an unprecedented expansion of the bankruptcy power to service the public interest at the expense of the private sector.

If the protection afforded by the fifth amendment is to harness effectively the bankruptcy power, there must be some point in time at which loss operations can no longer be forced upon a carrier, notwithstanding anticipated reorganization. Similarly, the fifth amendment would appear to require a fixed standard of compensation to which secured creditors are entitled before the assets securing their claims may unilaterally be taken away. In the context of *Connecticut General*, the Supreme Court could easily avoid a complicated, line-drawing analysis by holding that a remedy against the United States under the Tucker Act will ultimately be available to cure any constitutional defects of the RRRA. Nevertheless, it is hoped that the Court will not avoid the more substantive issues and will utilize this opportunity to establish more definite, permissible boundaries beyond which the bankruptcy power may not extend.

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204 *See, e.g.*, Hurley v. Kincaid, 285 U.S. 95, 104 (1932); Cherokee Nation v. Southern Kan. Ry., 135 U.S. 641, 659 (1890); Ogden River Water Users' Ass'n v. Weber Basin Water Conservancy, 238 F.2d 936, 942 (10th Cir. 1956).

If the Court holds the Act unconstitutional, necessitating a major redrafting, it is hoped that Congress will act as quickly as possible to remedy any infirmity.[205] Apart from constitutional considerations, it is submitted that as a policy matter, investors in railroad securities should be given more protection than is presently afforded by the RRRA in order to encourage the infusion of private capital into this vitally needed industry. Whatever public expense a more acceptable RRRA may entail, it would appear to be a relatively small price to pay for establishing modern and efficient rail services crucial to the national economy.

EPILOGUE: THE SUPREME COURT DECISION

On December 16, 1974, the Supreme Court removed the uncertainty surrounding the legality of the RRRA. Buttressing its decision on the availability of a Tucker Act remedy for aggrieved creditors, the Court, in the *Regional Rail Reorganization Act Cases*,[206] reversed and remanded *Connecticut General*. Writing for the majority,[207] Justice

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[205] The Act may also conflict with the uniformity requirement of the bankruptcy clause. Since the RRRA only applies to a specified region, *see* note 50 *supra*, creditors have contended it is not a valid exercise of Congress' power to enact "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4. *See, e.g.*, Brief for Plaintiffs at 42, Connecticut Gen., *supra* note 75. A two-judge majority in *Connecticut General* agreed with the creditors in a limited manner and held § 207(b), 45 U.S.C. § 717(b) (Supp. III, 1974), invalid on this basis because, under certain circumstances, the section mandates dismissal of a § 77 proceeding in its entirety. Connecticut Gen., *supra* note 75, at 9-10 (Fullam, J., concurring). Judge Fullam reasoned that since § 207(b) requires dismissal only if an *income-based* reorganization is unattainable (and if the processes of the RRRA are found not fair and equitable), railroads in the region would be denied the right to other types of § 77 relief (such as quasi-liquidation) available to railroads located elsewhere. *Id.* He concluded, therefore, that the Act was not uniform in that it resulted in different treatment of debtors located in different parts of the country.

The Special Court, on the other hand, found no violation of the uniformity requirement. The court noted that the uniformity required by the Constitution is geographic, "not temporal" and since Congress could have achieved the same result by having the RRRA apply to all operating railroads in the nation which were in reorganization on a given date, the fact that different phraseology was used would not justify finding a constitutional violation. Special Court, *supra* note 89, at 35-37. The validity of this approach was implicitly denied in *Connecticut General* where Judge Fullam rejected the

> argument that the statute is in fact uniform because all Class I railroads now in reorganization are located in the region defined in the statute. The statute is not limited to Class I railroads, and it is not, apparently, limited to railroads which were in reorganization on the effective date of the Act.

Connecticut Gen., *supra* note 75, at 7-8 (Fullam, J., concurring) (footnote omitted).

The Special Court has reversed those decisions of the reorganization courts which found the processes of the Act not fair and equitable. Special Court, *supra* note 89, at 16. Accordingly, no § 77 reorganization proceeding need be dismissed. The uniformity issue that troubled Judge Fullam, therefore, becomes moot.

[206] 43 U.S.L.W. 4031 (U.S. Dec. 16, 1974).

[207] Justices Douglas and Stewart dissented.

Brennan addressed himself primarily to the issues of interim erosion[208] and mandatory conveyancing.[209] In each instance, the Court determined that the Tucker Act remedy had not been withdrawn when Congress enacted the RRRA.[210] Moreover, such relief provided adequate assurance of just compensation for any otherwise unconstitutional taking engendered by the RRRA.[211]

Although utilizing the Tucker Act to withstand the constitutional attacks levelled at the RRRA, the Court failed to establish meaningful guidelines to be employed by the Court of Claims in awarding relief to injured creditors. In discussing interim erosion, the Court noted that there had been "no definitive determination that erosion . . . [had] reached unconstitutional dimensions . . . ."[212] Nonetheless, the Court, in this regard, cautioned that both the likelihood of a successful reorganization[213] and the public interest in continued operations[214] must be considered in determining when and to what extent uncompensated deficit operations may be constitutionally compelled. Furthermore, the Court upheld the mandatory conveyance provisions of the Act so long as secured creditors were assured of receiving "fair value, with interest" for their liens.[215] The proper method of valuation, however, remains for subsequent determination.

In upholding the RRRA, the Supreme Court has recognized the urgent need to revitalize the northeastern railroads. Nevertheless, its failure to provide specific guidance concerning the adequate compensation of beleaguered creditors signifies that additional litigation in this area will be forthcoming.

Alisa Levin Bleich

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208 43 U.S.L.W. at 4037-41. *See text* accompanying notes 94-134 *supra.*

209 43 U.S.L.W. at 4041-47. *See* text accompanying notes 135-85 *supra.*

The majority also upheld the Act as satisfying the uniformity requirement of the Constitution's bankruptcy clause. 43 U.S.L.W. at 4048-49. *See* note 205 *supra.*

210 43 U.S.L.W. at 4041, 4045. In dissenting, Justice Douglas disagreed with the Court's finding of the availability of a Tucker Act remedy, terming the RRRA "a lawless maneuver of gigantic proportions." *Id.* at 4049.

211 *Id.* at 4041, 4047. Notably, the Court relied heavily upon the cram-down provision of § 77 to justify the mandatory conveyance provisions. Depriving creditors of the right to reasonably disapprove a plan was not considered of constitutional significance. *Id.* at 4047 n.41. *See* text accompanying notes 164-67 *supra.*

212 43 U.S.L.W. at 4037.

213 *Id.* at 4042 n.24.

214 *Id.* at 4037.

215 *Id.* at 4047.